Confidentiality and victim-offender mediation

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1 Overview and Purpose of Study

1.1 Background of the Research

The concept of mediation as a means of conflict resolution has rapidly spread around the world. It is used to solve civil and administrative disputes, but is also increasingly considered a significant way of dealing with crime, as an alternative or an addition to traditional criminal proceedings.

The growing attention for victim-offender mediation and its benefits has instigated the call for principles and rules governing the practice of penal mediation. This has led to the development of international protocols that promote and facilitate the institutionalisation and use of victim-offender mediation. Article 10 of the EU Framework Decision on the Standing of Victims in Criminal Proceedings[1] exhorts member states to promote mediation in criminal cases for offences which they consider appropriate for this sort of measure. In addition, the Council of Europe[2] and the United Nations[3] have both issued a set of principles for victim-offender mediation.

Although the added value of victim-offender mediation is widely acknowledged, as is the need for clear and uniform guidelines, mediation in criminal cases lacks a statutory basis in many countries. The main emphasis has been on the advantages of victim-offender mediation *vis-à-vis* the criminal justice system and on how to maximise these advantages without violating the interests of victims and offenders. While this is an important aspect of promoting the use of victim-offender mediation, attention should also be paid to positioning the procedure within the legal system. In order to realise the potential of victim-offender mediation to deal with crime through the establishment of a dialogue between victims and offenders, the procedural requirements and implications of the process should also be considered. Due to its focus, penal mediation plays a role within the legal system and can interact with criminal and civil law. As a result, the design of the mediation procedure should not only concentrate on safeguarding the benefits of the process, but also on its coexistence next to these legal areas of the law.

One of the main procedural requirements that is generally considered to be necessary for a proper functioning of mediation is the principle of confidentiality. This principle is included in the Council of Europe

1 Council Framework Decision of 15 March 2001, 2001/220/JHA (*OJ* 2001 L 82/1).

2 Recommendation R (99)19 concerning Mediation in Penal Matters Adopted by the Committee of Ministers (15 September 1999).

3 United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, 1-26 July 2002, Res/2002/12.

Recommendation[4] and the United Nations Basic Principles[5] mentioned above. According to these international protocols, all those involved in mediation (the victim, the offender, the mediator, and trusted third parties) are expected to keep quiet about the things said and done during the mediation process. Although it is beyond doubt that victim-offender mediation benefits from a ban on indiscriminate disclosure of its contents, the question arises whether exceptions should be made to this rule. Observing secrecy unconditionally implies that victims and offenders are not allowed to discuss the process they have been involved in with, for example, their family and friends, and that the contents of a mediation cannot be disclosed in court, although such information may conceivably be relevant in the light of subsequent judicial proceedings.

The wording of the principle of confidentiality in the international protocols illustrates how the topic of victim-offender mediation was addressed in the past. The focus was mainly on improving the quality of the mediation procedure itself. Little attention was paid to the legal concepts victim-offender mediation may interact with and to problems that may rise in this respect. Mediation confidentiality is particularly susceptible to problems, because the current interpretation of the confidentiality principle does not take into account how the resulting ban on disclosure may affect victims and offenders. The consequences of the principle of confidentiality for the mediation participants have hardly been recognised, while these are very likely to occur in areas where they can have a strong impact on the participants' lives; according to the advocated scope of the principle of confidentiality, mediation participants cannot talk to their social environment about the mediation, nor are they allowed to submit mediation information in criminal or civil court.

As victim-offender mediation aims at enabling victims and offenders to come to terms with each other and the crime that has happened, the point of departure should at the very least be that mediation does not add to their distress; drawbacks of the confidentiality principle should be avoided. Consequently, frictions between victim-offender mediation and related systems, such as criminal and civil law, should be resolved in order to be able to position penal mediation on a solid and practicable footing.

The research presented in this book examined the desired scope of the confidentiality of victim-offender mediation, with the ultimate aim of contributing to a wider applicability of penal mediation, allowing more victims and offenders to reap its benefits.

4 Paragraph 2 of the Recommendation.
5 Paragraph 14 of the Basic Principles.

1.2 Research Question and Objectives

The background to the research described in the previous section can be captured in the following research question:

> Should exceptions be made to the strict confidentiality regimen which emanates from the basic principles governing the process of victim-offender mediation, and, if so, to what extent and on what grounds?

The principle of confidentiality is considered one of the main standards of victim-offender mediation. Its current interpretation may cause frictions that may necessitate disregarding the confidentiality rule in some situations. This research aims at identifying these possible exceptions in order to determine the preferable extent of mediation secrecy. A necessary element of this is to examine the grounds on which legitimate exceptions to the principle of confidentiality could and should be made. If and where appropriate, guidelines will be developed to determine the scope of these possible exceptions.

1.3 Research Approach

Participation in mediation has significant benefits for victims and offenders. It offers them an opportunity to share their experiences and to reach an agreement. Since a free exchange of information is a substantial constituent, it is generally acknowledged that victim-offender mediation should take place in a private setting. This allows the parties to talk about their cares and concerns without restraints, and to reach an agreement that is based on their true needs and interests. The confidential nature of victim-offender mediation is laid down in, *inter alia*, two international protocols (see Section 1.1). These international documents have the status of guidelines – they are not legally binding. Nevertheless, they do express the perceived value of the principle of confidentiality. The extent of mediation confidentiality, as it is expressed and interpreted in these protocols, was therefore taken as the starting point of this research: must all mediation information be subject to secrecy, or can and should exceptions to this rule be made?

Thus far, the topic of confidentiality in victim-offender mediation has scarcely been explored. Although the need for confidentiality is recognised nationally and internationally, domestic mediation programmes and legislation generally do not address the issue in detail. As a result, little literature is available. Where appropriate, the available literature was therefore supplemented with relevant source material from related areas, such as (criminal and civil) law, victimology, and psychology.

The research examined the desired scope of mediation confidentiality from a legal point of view. Legal sources were therefore used to study the areas of the law which victim-offender mediation can interact with, namely

criminal and civil law. Their main features were considered in the light of various international and national documents. However, victim-offender mediation, which incorporates legal and social aspects in a unique way, cannot be studied without taking into account the large body of victimological and psychological knowledge available. Empirically derived insights from these areas were therefore taken into consideration as well. The research made use of expert studies, offering comprehensive and detailed findings on various relevant topics. They provided an answer to a variety of pertinent questions, and furthermore helped to shed light on new issues that were of special relevance in the context of this research. Based on these legal, psychological, and victimological sources, the various steps (see below) needed to answer the central research question were addressed.

In addition to the above-mentioned source material, this research made use of relevant examples of national law. The goal was to determine generalisable examples for the situations concerned. Since a systematic comparative approach was unfeasible, it was not endeavoured to compare a few legal systems in detail. The countries to be discussed were selected for their potential to illustrate the situation or the effects of a particular suggestion in their legal systems. Consequently, in some cases, the differences between families of law, such as civil law and common law, were studied. Other issues required a more detailed approach and called for a comparison between civil-law countries with each other. For reasons of accessibility and familiarity, a relatively large number of examples were taken from the situation in the Netherlands, but only where Dutch regulation offers general and broadly applicable examples. As a result of this approach, the research was universal in character, and aimed at presenting generalisable results.

The literature research, the chosen comparative approach, and the author's informed views served to develop various steps in formulating an answer to the central question. Making an exception to the principle of confidentiality implies that information from the mediation can be disclosed in particular situations. The frictions that may result from unconditional adherence to the principle of confidentiality can relate to the social environment of the mediation participants and to their involvement in judicial proceedings. If exceptions were formulated to resolve these frictions, the information concerned could then be disclosed both to out-of-court recipients and in court. Both settings require a different approach, and different factors should be taken into consideration to assess the desired level of confidentiality.

The research question of this study necessitated balancing interests, namely those that are protected by the principle of confidentiality, and those that may possibly be harmed by this rule. Therefore, a framework had to be developed to weigh the interests involved. This framework had to acknowledge the main features of the relevant systems and concepts. Not all

of these elements might be needed for the assessment of each friction, but to answer the central question, all of them were necessary. The resulting research framework consists of three main pillars: victim-offender mediation, criminal law, and civil law. The main characteristics of these pillars constituted the basis of the framework and enabled balancing the interests involved.

The assessment of the issue of out-of-court disclosure to third parties mainly consisted of an examination of the psychological effects of prohibiting victims and offenders to talk to others about what happened in mediation. These implications of observing the principle of confidentiality had to be weighed against the violation of the mediation essentials induced by a breach of this rule. In this context, only the first pillar of the research framework, regarding the features of victim-offender mediation, was relevant. For the friction regarding out-of-court disclosure, a distinction was made between various categories of out-of-court recipients of the information concerned. The specific characteristics of the different mediation participants was paid attention to, as was their position in victim-offender mediation. A basic premise was the standard that participation in mediation should at the very least not add to the participants' distress. Additionally, the consequences of making exceptions for the mediation procedure itself were taken into consideration. On the basis of these criteria, the desired level of confidentiality in out-of-court situations was established.

Exceptions resulting in disclosure in court imply that mediation information can be submitted in judicial proceedings. As a result, the tenability of observing or breaching the confidentiality rule not only had to be tested against the characteristics of victim-offender mediation, but also against the main features of criminal and civil law. Consequently, the entire research framework had to be taken into consideration.

The assumption that participation in victim-offender mediation can have significant benefits for both victims and offenders, and should never add to their distress, implies that the applicability of the principle of confidentiality should be reconsidered if it gives rise to situations that may undo the advantages of participating, or that have additional drawbacks. The potential frictions with the principle of confidentiality therefore had to be examined. The ensuing situations might necessitate making an exception to mediation confidentiality in order to remedy the harm caused by them. Consequently, making exceptions should compensate the mediation participants effectively and the assessment of the effectiveness of breaching the principle of confidentiality was therefore a necessary step in determining the advisable level of secrecy. Disclosure of mediation information can be considered effective if the criminal or civil court can take that information into account.

To determine whether this was the case, it is first of all necessary to regard

the compatibility of breaching the confidentiality rule with the essential characteristics of victim-offender mediation; making exceptions should not subvert the mediation procedure itself without good reason. The consequences of overruling the principle of confidentiality for other mediation standards therefore had to be examined.

Secondly, was making exceptions consistent with the main features of criminal and civil law? Making exceptions implies the use of the information concerned in court in order to offer the mediation participants an effective remedy for the harm caused by the conflicting interest. For that reason, it is important that the characteristics of criminal and civil law are observed to the extent necessary in order to safeguard the admissibility of mediation information in judicial proceedings. The research framework enabled this examination, facilitating the determination of the procedural position of the mediation participants as well as their options to submit information in court, which is a precondition for the court to be able to take mediation information into consideration.

1.4 Structure of the Book

The book is divided into four parts. The first part contains an introduction to victim-offender mediation (Chapter Two) and a discussion of its main procedural requirements (Chapter Three). At the end of the third chapter, the potential frictions that may be caused by the principle of confidentiality will be identified. Part Two will be devoted to the development of the research framework mentioned above (Chapter Four). Part Three will examine the frictions which may be caused by the principle of confidentiality in more detail. Chapter Five will look at the desirability of making an exception to non-disclosure to out-of-court recipients. Chapters Six and Seven will deal with the frictions regarding the advisability of making exceptions to non-disclosure in judicial proceedings. The procedural positions of the mediation participants and their opportunities to present information in court will be discussed in Chapter Eight. In Part Four (Chapter Nine), the main findings and the conclusions will be presented.

PART ONE

INTRODUCTION

2 Victim-Offender Mediation

2.1 Introduction

Current victim-offender mediation programmes range from informal meetings to well-regulated processes, yet all forms share the same key elements. One of these is the focus on establishing communication between victims and offenders, to help them deal with the consequences of crimes that connect them. Victims and offenders are thus both actively involved, and their interaction enables victims to express their needs and feelings to the offender, and offenders to accept and act on their responsibilities towards the victim.[6] To facilitate this dialogue, the help of an impartial third party, the mediator, is of vital importance.

Victim-offender mediation is often linked to the concept of restorative justice. Restorative justice primarily aims at redressing the harm caused by a crime and thus highlights the relationship between victims and offenders, whereas its counterpart, retributive justice, mainly focuses on punishing perpetrators and hence on the position of offenders in relation to society. Because of its emphasis on remedial action, restorative justice acknowledges the victim as an important actor. As retributive justice traditionally concentrates on establishing the offender's criminal liability, it does not recognise the victim as a party to criminal proceedings (despite such recent initiatives as the victim impact statement).[7]

Mediation has been typified as an equivalent to, or as a modality of, restorative justice.[8] A distinction can and should be made between the ideas behind restorative justice and how these ideas are put into practice. From an operational point of view, restorative justice offers victims and offenders a

6 Among others, *Statement on the Position of the Victim within the Process of Mediation* of the European Forum for Victim Services (now Victim Support Europe) (2004); M.S. Umbreit, R.B. Coates & B. Vos, 'Victim-Offender Mediation: Three Decades of Practice and Research', *Conflict Resolution Quarterly* 2004-1/2, p. 279; and H. Zehr, 'Commentary: Restorative Justice: Beyond Victim-Offender Mediation', *Conflict Resolution Quarterly* 2004-1/2, p. 308.

7 In this respect, see also D. Roche, 'Retribution and Restorative Justice', in: G. Johnstone & D.W. van Ness (eds.), *Handbook of Restorative Justice*, Cullompton: Willan Publishing 2007, pp. 75-90; and R.A. Duff, 'Restoration and Retribution', in: A. von Hirsch (ed.), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?*, Oxford: Hart Publishing 2003, pp. 43-59.

8 See, for example, I. Aertsen, *Slachtoffer-daderbemiddeling. Een onderzoek naar de ontwikkeling van een herstelgerichte strafrechtsbedeling*, Leuven: Universitaire Pers Leuven 2004, pp. 161-162; and H. Strang, *Repair or Revenge: Victims and Restorative Justice*, Oxford: Clarendon Press 2002, pp. 43ff. Furthermore, L. Presser & C.A. Hamilton, 'The Micropolitics of Victim-Offender Mediation', *Sociological Inquiry* 2006-3, p. 316; Zehr 2004, p. 305; and W.R. Nugent, M. Williams & M.S. Umbreit, 'Participation in Victim-Offender Mediation and the Prevalence of Subsequent Delinquent Behaviour: A Meta-Analysis', *Research on Social Work Practice* 2004-6, p. 408.

possibility to achieve reparation and restoration through participation. Victim-offender mediation can be considered a means to realise this, and as such forms one of the core techniques of restorative justice. Restorative justice should thus be regarded as a theoretical concept that is operationalised through a variety of reparative approaches, one of which is victim-offender mediation.

The justification of using victim-offender mediation as a means of dealing with crime follows from the principle of subsidiarity and the notion of *ultimum remedium* that dominate criminal law theory. The main objective of criminal justice is to restore the legal order after a crime has been committed. This legal order also extends to the rights of crime victims that have been violated, and victim-offender mediation can be considered a way to repair such violations.

The principle of subsidiarity entails that a case should not be brought before a criminal court if less far-reaching instruments are available. The idea of *ultimum remedium* expresses a similar thought, namely that a criminal trial and the infliction of a punishment should be avoided if possible.[9] Victim-offender mediation offers such an alternative and more lenient response to crime. It is less drastic and can divert cases from the criminal justice system. If this is not an option – due to the seriousness or complexity of the crimes concerned – mediation can still play a role in the course of proceedings, and can, for example, influence the severity of the sentence to be imposed. Furthermore, victim-offender mediation seems to lead to a decrease of recidivism and stimulates the reintegration and rehabilitation of offenders.[10] For that reason, starting a mediation even after an offender has been convicted may still yield significant benefits.

The various forms of victim-offender mediation can be divided into three categories reflecting the timing of mediation: before, during, or after a criminal trial.[11] As this classification of the existing forms of victim-offender

9 For a further explanation of the *ultimum remedium* principle in relation to victim-offender mediation and other restorative initiatives, see M.S. Groenhuijsen & N.J.M. Kwakman, 'Het slachtoffer in het vooronderzoek', in: M.S. Groenhuijsen & G. Knigge (eds.), *Dwangmiddelen en rechtsmiddelen. Derde interimrapport onderzoeksproject Strafvordering 2001*, Deventer: Kluwer 2002, pp. 849-850 and 964ff. See also M. Löschnig-Gspandl, *Die Wiedergutmachung im Österreichischen Strafrecht*, Vienna: Verlag Österreich 1996, pp. 72-73.

10 Among others, see L.W. Sherman & H. Strang, *Restorative Justice: The Evidence*, London: The Smith Institute 2007, pp. 68-71; H. Hayes, 'Reoffending and Restorative Justice', in: Johnstone & Van Ness (eds.) 2007, pp. 426-444; W. Bradshaw, D. Roseborough & M.S. Umbreit, 'The Effect of Victim Offender Mediation on Juvenile Offender Recidivism: A Meta-Analysis', *Conflict Resolution Quarterly* 2006-1, pp. 87-98; Umbreit, Coates & Vos 2004, pp. 292-294; Nugent, Williams & Umbreit 2004, p. 415; W.R. Nugent *et al.*, 'Participation in Victim-Offender Mediation and Reoffense: Successful Replications?', *Research on Social Work Practice* 2001-1, pp. 5-23; and G. Bazemore, 'Restorative Justice and Earned Redemption', *The American Behavioral Scientist* 1998-6, pp. 768-813.

11 M.S. Groenhuijsen, 'Victim-Offender Mediation: Legal and Procedural Safeguards. Experiments and Legislation in Some European Jurisdictions', in: The European Forum

mediation has played a major role in this research, it will be discussed in more detail in the following sections.

2.2 Victim-Offender Mediation as a Diversionary Measure

From the notion of *ultimum remedium* and the principle of subsidiarity it follows that victim-offender mediation can divert a case from the criminal justice system. Victim-offender mediation and its outcome then replace the criminal trial and the imposition of a sentence.[12]

The concept of diversion is characterised by a number of elements.[13] First, the main reason for diverting a case is that offenders are thought to be better off when their cases are dealt with through mediation; diversion does, after all, imply that no sentence will be imposed. Victim-offender mediation can also take away or diminish potential drawbacks of a trial for offenders, such as intentionally causing distress, stigmatisation, and reintegration problems. However, if offenders expect to benefit from having their cases brought to court, they have the freedom to refuse to participate in victim-offender mediation.[14]

The second element of diversion concerns the moment of referring a case to penal mediation. A successful mediation implies that no further legal steps will be taken, and a case must therefore be referred to mediation before it has been subjected to judicial assessment. This moment can be considered the upper limit of diversion. However, as diversion aims at diminishing or even preventing criminal intervention, cases will most likely be referred during the pre-trial phase. The moment when the facts of a case are more or less clear and a suspect has been identified can thus be considered the lower limit of diversion. This coheres with the fact that both the victim and the offender should acknowledge the basic facts of a case before the start of a mediation.[15] In practice, clarity on the facts and the alleged involvement of a suspect will often coincide. Depending on the characteristics of the case at hand and on the features of the jurisdiction involved, the referral to mediation can be made at either the police or the prosecutorial level.

Insofar as diversion implies that a successful mediation will lead to termination of criminal proceedings, this modality of victim-offender

for Victim-Offender Mediation and Restorative Justice, *Victim-Offender Mediation in Europe. Making Restorative Justice Work*, Leuven: Leuven University Press 2000, pp. 71-72. In addition, Sherman & Strang 2007, p. 32; D. Miers & J. Willemsens (eds.), *Mapping Restorative Justice*, Leuven: European Forum for Victim-Offender Mediation and Restorative Justice 2004, pp. 167-168; and D. Miers, *An International Review of Restorative Justice*, London: Home Office 2001, pp. 81-82.

12 In this respect, see also Umbreit, Coates & Vos 2004, pp. 291-292.

13 Coornhert-Liga, *Rechtsomlegging*, Utrecht: Ars Aequi Libri 1980, pp. 68ff.

14 On the voluntary nature of the offender's participation in victim-offender mediation, see Chapter 3.2.2.

15 See also Chapter 3.2.1.

mediation primarily deals with minor offences. Nevertheless, the offences that are considered referable to victim-offender mediation differ between the national legal systems that recognise this kind of mediation as a diversionary measure. A number of these systems will be discussed below.

Austria is one of the first European countries that experimented with victim-offender mediation, and probation service and victim support influenced the development of a variety of programmes. Cases are mostly referred to victim-offender mediation by the public prosecutor, although in some cases the decision is left to the judge.[16] Legal provisions regarding victim-offender mediation can be found in the Austrian Juvenile Justice Act (*Jugendgerichtsgesetz*, JGG) and the Code of Criminal Procedure (*Strafprozessordnung*, StPO). The legal provisions regarding victim-offender mediation – or *Tatausgleich* – have been incorporated in the StPO.[17] Referrals to mediation are mainly founded on Arts. 198 *et seq*. StPO. Art. 198 StPO categorises victim-offender mediation as part of the 'diversion package', a set of diversionary measures that can be offered to both juvenile and adult offenders.[18] Besides victim-offender mediation, the diversionary measures include, for example, community service, probation, and the payment of a fine (Art. 198, para. 1, under 1-4 StPO).[19] Victim-offender mediation in Austria has developed into a general service that applies to both juvenile and adult offenders.[20] As a result, organisational and methodological differences between mediation in adult and juvenile cases have nearly disappeared. However, the JGG still retains a few specific regulations for minors. For example, juvenile offenders have easier access to victim-offender mediation (and to other divisionary measures) than adult perpetrators do.

According to Arts. 190-191 StPO, the public prosecutor can terminate a case without taking any further action if there are insufficient grounds for continued prosecution, or if the offence is not serious enough to merit continuation.[21] Specific conditions applying to juveniles can be found in Arts. 4 and 6 JGG. If the public prosecution service assesses that the mere dismissal of a case would be inappropriate, it can turn to the measures that are included in the diversion package. The conditions for diversion have been set out in Art. 198 StPO. In brief, they include the following prerequisites: sufficient clarification of the facts, no serious culpability, no

16 C. Pelikan, 'Victim-Offender Mediation in Austria', in: The European Forum for Victim-Offender Mediation and Restorative Justice 2000, p. 129.

17 M. Löschnig-Gspandl, 'Diversion in Austria: Legal Aspects', *European Journal of Crime, Criminal Law and Criminal Justice* 2001-4, p. 281.

18 Miers & Willemsens (eds.) 2004, p. 15.

19 See also Löschnig-Gspandl 2001, pp. 282 and 285-286.

20 V. Hofinger & C. Pelikan, 'Victim-Offender Mediation with Juveniles in Austria', in: A. Mestitz & S. Ghetti (eds.), *Victim-Offender Mediation with Youth Offenders in Europe*, Dordrecht: Springer 2005, p. 160.

21 In addition, Art. 192 StPO discusses the prosecution of a crime if an offender allegedly committed more than one offence.

loss of life, a maximum sentence of five years imprisonment, and no need for preventive action.[22] It follows that the diversionary measures of Art. 198 StPO primarily apply to minor offences.

A precondition for offences to be considered suitable for mediation is that they could potentially have caused direct harm to a person's legal interests (Art. 204, para. 1 StPO). Furthermore, the following additional requirements have to be met: the offender has to be willing to a) take responsibility for the crime, b) make amends for its consequences, c) make efforts to repair the damage caused by the crime, and d) reflect on the reasons for having committed the crime (Art. 204 StPO).[23] Also, the victim needs to consent to take part in the mediation procedure. If the victim does not agree, the case must be sent back to the public prosecutor, who decides on how to proceed. The reasons for the victim's refusal will be taken into consideration in this respect, unless they are irrelevant to the case at hand. As a final condition, the victim's interests have to be taken into consideration as much as possible.[24] In the case of juvenile offenders, Art. 8 para. 3 JGG states that the victim's consent to victim-offender mediation is not necessary; the offender's effort to provide compensation suffices.[25]

If the above-mentioned conditions are met and a victim-offender mediation results in an agreement between the parties, the prosecution will not be continued. The agreement usually addresses the settlement of the damage suffered and the regulation of future contact between the victim and the offender.[26]

Another country that uses victim-offender mediation as a way of diverting cases from the criminal justice system is Germany. Here too, the referral to mediation is predominantly made by the public prosecutor.[27] Victim-offender mediation – or *Täter-Opfer-Ausgleich* – can lead to the diversion of cases involving adult as well as juvenile offenders. Provisions addressing penal mediation are incorporated in the Code of Criminal Procedure (*Strafprozessordnung*, StPO), the Penal Code (*Strafgesetzbuch*, StGB), and the Juvenile Justice Act (*Jugendgerichtsgesetz*, JGG).

22 M. Löschnig-Gspandl, 'The Austrian Prosecution Service', in: P.J.P. Tak (ed.), *Tasks and Powers of the Prosecution Services in the EU Member States*, Nijmegen: Wolf Legal Publishers 2004, p. 38.

23 See M. Löschnig-Gspandl & M. Kilchling, 'Täter-Opfer-Ausgleich und Wiedergutmachung in Deutschland und Österreich', in: H.J. Albrecht (ed.), *Forschungen zu Kriminalität und Kriminalitätskontrolle am Max-Planck-Institut für ausländisches und internationales Strafrecht in Freiburg i. Br.*, Freiburg i. Br.: Max-Planck-Institut für ausländisches und internationales Strafrecht 1999, pp. 258-259.

24 Hofinger & Pelikan 2005, p. 163.

25 Löschnig-Gspandl 2004, p. 39.

26 Pelikan 2000, pp. 140-141. Further regarding victim-offender mediation in Austria, see M. Kilchling & M. Löschnig-Gspandl, 'Legal and Practical Perspectives on Victim/Offender Mediation in Austria and Germany', *International Review of Victimology* 2000-4, pp. 305-332.

27 Miers & Willemsens (eds.) 2004, pp. 70-71.

Both the StPO and the StGB regulate the victim-offender mediation process with adult offenders. In practice, the StPO provisions are applied more often.[28] Art. 155a StPO states that prosecutors and judges must examine the possibilities of mediation options at all stages of the proceedings and refer suitable cases to mediation. These referrals can be made early on in the proceedings and may thus divert the case.

According to Art. 153a, para. 1 StPO, the prosecutor can decide not to take a case to court if the degree of guilt is not an obstacle, and if meeting the requirements imposed can adequately counterbalance the public interest in the prosecution of the case. Para. 1, under 5 of Art. 153a StPO mentions victim-offender mediation as one of these requirements. To qualify for participation in mediation, the offender should make every effort to reach an agreement with the victim, and to compensate the damage suffered. Moreover, Art. 153a StPO stipulates that the fulfilment of these requirements will effectively terminate the prosecution.

Art. 46a StGB sets forth the conditions under which the court can decide not to impose a punishment or to mitigate the sentence to be imposed in recognition of a successful victim-offender mediation. According to Art. 153b StPO, the prosecutor can decide not to bring action against the alleged offender under similar circumstances. These are the same conditions as those mentioned in Art. 153a, para. 1 StPO (Art. 46a, para. 1 StGB). Additionally, the maximum penalty for the offence cannot exceed the limit of one year's imprisonment or a multiple of 360 of the day fine.[29] As all fines are thus included, and many offences carry a fine or a maximum prison sentence of one year, 95 percent of sentences fall within this category.[30] The use of victim-offender mediation, on the basis of Art. 46a, para. 1 StGB therefore primarily concerns offences. The same goes for referrals based on Art. 153a, para. 1, under 5 StPO, since the degree of guilt is named as one of the factors that should be taken into account.[31] Nevertheless, more serious crimes can be referred to victim-offender mediation as well, as the above-mentioned provisions initially apply to all offences.[32]

Victim-offender mediation with juvenile offenders is mainly regulated in the JGG.[33] Since the JGG generally prevails over the StPO, the latter only fulfils a complementary role in this respect.[34]

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28 B. Bannenberg, 'Victim-Offender Mediation in Germany', in: The European Forum for Victim-Offender Mediation and Restorative Justice 2000, p. 255.

29 German fines are quoted in daily rates. The limit of 360 daily rates must not be exceeded.

30 Miers & Willemsens (eds.) 2004, pp. 68-69; Bannenberg 2000, pp. 251ff; and Kilchling & Löschnig-Gspandl 2000, p. 310.

31 T. Trenszek, 'Victim-Offender Mediation in Germany: ADR under the Shadow of the Criminal Law?', *Bond Law Review* 2001-2, p. 3-4, through <http://www.austlii.edu.au/au/journals/BondLRev/2001/16.html>.

32 Miers & Willemsens (eds.) 2004, p. 69.

33 See Löschnig-Gspandl & Kilchling 1999, p. 245.

34 M. Kilchling, 'Victim-Offender Mediation with Juvenile Offenders in Germany', in: Mestitz & Ghetti (eds.) 2005, p. 245.

The JGG recognises different forms of victim-offender mediation. It can be enforced as an educational measure by the judge.[35] The judge can also impose disciplinary measures on a minor, such as the compensation of damage or an apology to the victim.[36] Mediation can also be ordered by a judge, if the public prosecutor has expressed the intention to drop the case, combined with an order for the offender to make an attempt at reconciliation.[37] The public prosecutor can also refer a case to mediation before deciding on the dismissal of the case.[38] Only this last form of mediation can be considered diversion; as the other situations involve a judicial decision, they cannot be labelled as such.

When a juvenile offender is involved, generally all types of offences qualify for victim-offender mediation. Art. 45, para. 2 JGG provides that the public prosecutor can decide not to prosecute when a) an educational measure has been initiated or carried out, b) the requirements of paragraph 3 have been met, and c) it is deemed unnecessary to continue the investigation of the charge. The last part of paragraph 2 equates an educational measure with victim-offender mediation. The requirements mentioned under b) demand a confession by the offender. Additionally, the prosecutor must hold the opinion that victim-offender mediation is the proper way of dealing with the case at hand, while investigating the charge is not.[39]

Victim-offender mediations, whether with adult or juvenile offenders, usually end in a written agreement, which often include various items, such as the compensation of damages (pecuniary or otherwise), and an apology by the offender.[40]

2.3 Victim-Offender Mediation as Part of Regular Court Proceedings

When diversion is not an option – for example due to the seriousness of the case – victim-offender mediation can also be part of regular court proceedings[41] and be of benefit to both the victim and the offender.

When mediation is used in addition to regular court proceedings, the outcome or the course of the mediation process may influence the court's decision. This coheres with the notion of *ultimum remedium* and the principle of subsidiarity; the choice that should accordingly be made for the least radical intervention implies that mediation can be used to replace part of the judicial decision. For example, the outcome of a mediation or the behaviour

35 Art. 10, para. 1, under 7 JGG.
36 Art. 15, para. 1, under 1 JGG and Art. 15, para. 1, under 2 JGG, respectively.
37 Art. 45, para. 3 JGG.
38 Art. 45, para. 2 JGG. See also Miers & Willemsens (eds.) 2004, p. 67.
39 Art. 45, para. 3 JGG.
40 Bannenberg 2000, p. 267.
41 Groenhuijsen 2000, pp. 71-72.

of its participants during the session[42] may lead to a mitigation of the sentence. The agreement between the victim and the offender then functions as a substitute for the part of the sentence that is not imposed; mediation can thus be regarded as a less radical reaction to the crime at hand. Victim-offender mediation during court proceedings may also have other benefits for the participants. It may have a positive effect on the coping process of the victim and the offender, the rehabilitation and reintegration of the offender, and the recognition of the victim.

The lower and upper limits of the current modality of victim-offender mediation depend on the involvement of the judge. The moment that a case is submitted to the court for its final assessment is the upper limit of the possibility of diversion. This moment is automatically the lower limit of the mediation modality being discussed here. Its upper limit is the moment that the court has given its definitive ruling on the case; from that moment on, the mediation and its outcome can no longer influence the judgement.

All types of offences qualify for a mediation process that is part of regular court proceedings. Victim-offender mediation has proven to be useful and valuable, also in the case of serious crimes.[43] Which offences are referred to mediation in practice depends on the policy of the different jurisdictions. However, in principle, both serious offences and misdemeanours may qualify.

Belgium is an example of a country that uses victim-offender mediation as part of regular court proceedings. Various mediation programmes are used throughout the country, both law-based and project-based. Victim-offender mediation in Belgium manifests itself during various stages of criminal justice proceedings. This follows from Article 553, paragraph 1 of the Code of Criminal Procedure (*Wetboek van Strafvordering*, WvSv), which reads that all parties interested can request their case be referred to mediation at any time during criminal proceedings as well as during the serving of the sentence. Paragraph 2 states that the persons concerned should be informed about the possibility to request a referral to mediation. Both adult and juvenile offenders are eligible for mediation. The result of the mediation may influence either the course or the outcome of the criminal trial.

A programme that mainly concentrates on adult perpetrators of serious crimes is mediation for redress (*herstelbemiddeling* or *médiation après poursuite*). One of the requirements of the experimental phase of the project was that the public prosecutor had already decided to prosecute.[44] After the mediation-for-redress programme had been legally established in June 2005,

42 The question what information from a mediation may be used during subsequent criminal proceedings will be addressed in the upcoming chapters.

43 Among others, see M.S. Umbreit *et al*., 'Victims of Severe Violence in Mediated Dialogue with Offender: The Impact of the First Multi-site Study in the U.S.', *International Review of Victimology* 2006-1, pp. 27-48; and Nugent *et al*. 2001, pp. 6-7.

44 Miers & Willemsens (eds.) 2004, p. 26.

this requirement was officially abandoned, but, in practice, public prosecutors still tend to refer cases to this type of victim-offender mediation after deciding to charge the offender.[45] Because mediation in this context can influence the court's sentencing decision, the programme introduced and promoted interaction between mediation and the criminal justice system.[46] The use of mediation for redress is based on Arts. 553 *et seq*. WvSv.[47] It is carried out throughout Belgium. According to Arts. 163 and 195 WvSv, the court can take the outcome of a mediation into account; Art. 163 WvSv concerns the final judgement of the police court (*politierechtbank* or *tribunal de police*) and Art. 195 WvSv that of the correctional court (*correctionele rechtbank* or *tribunal de première instance*). Art. 555, para. 1 WvSv stipulates that the mediation parties can agree to disclose certain information from the mediation.[48] If mediation information is subsequently revealed to the court, the court should both confirm receipt and specify the use of this information in its judgement.[49] In conclusion, Belgian criminal courts can have regard to information from a mediation when assessing a case.

Juvenile offenders too can take part in mediation during regular court proceedings in Belgium. According to Article 52quinquies of the Youth Protection Act (*Wet betreffende de Jeugdbescherming*, JBW), the juvenile court can refer cases concerning juvenile offenders to mediation or family group conferencing (*herstelgericht groepsoverleg*).[50] If an agreement is reached and carried out prior to the judgement of the juvenile court, the court should take this into account.[51] If the agreement is completed after the court has pronounced judgement, it can revise its decision if so desired.[52]

In principle, all types of offences can be referred to the present form of mediation in Belgium. This holds especially true for serious offences, as Belgium also has mediation programmes that can lead to diversion from the criminal justice system; these programmes mainly deal with misdemeanours. The outcome of a mediation that is used as part of regular court proceedings may vary from financial compensation to apologies by the offender.

45 See also I. Aertsen, 'The Intermediate Position of Restorative Justice: The Case of Belgium', in: I. Aertsen, T. Daems & L. Robert (eds.), *Institutionalizing Restorative Justice*, Devon: Willan Publishing 2006, pp. 71-72.

46 I. Aertsen, 'Victim-offender mediation in Belgium', in: The European Forum for Victim-Offender Mediation and Restorative Justice 2000, p. 159. See also Aertsen 2004, pp. 218ff.

47 C. van den Wyngaert, *Strafrecht, strafprocesrecht & internationaal strafrecht*, Antwerp/Apeldoorn: Maklu 2006, pp. 542ff.

48 This is an exception to the requirement of confidentiality laid down in the same provision.

49 Arts. 163 and 195 WvSv.

50 See also A. Wolthuis, 'Herstel in de Belgische jeugdwet', *Proces* 2008-5, pp. 168-176; and I. Vanfraechem, 'Herstel en de Belgische jeugdwet', *Tijdschrift voor Herstelrecht* 2007-3, pp. 7-18.

51 Art. 37quinquies, para. 2 JBW.

52 Art. 37quinquies, para. 3 JBW.

Poland has introduced the use of victim-offender mediation in regular court proceedings fairly recently. In 2003, the possibility to refer a case to mediation at any stage of penal proceedings was added to the Code of Criminal Procedure (*Kodeks postępowania karnego*, KPK).[53] As a result, victim-offender mediation both as a diversionary measure and during the criminal proceedings have become possible too.[54]

During regular court proceedings, the court can refer adult offenders to mediation (the state prosecutor can do so during preliminary proceedings). According to Art. 23a, para. 1 KPK (in conjunction with Art. 489 KPK if the prosecution is privately instigated), they may do so of their own accord or with the consent of the parties. The prosecutor must take the outcome of the mediation process into account in deciding on the submission of the case to court. If the offender is charged, the result of a mediation can be taken into consideration by the court. According to Article 53, paragraph 3 of the Penal Code (*Kodeks karny*, KK), a positive outcome of the mediation can have a mitigating effect on the court's sentencing decision. The court can decide to conditionally suspend the proceedings, or to pass sentence without trying the case.[55] However, the mediation outcome should not prescribe any solution in a particular case.[56] Furthermore, the severity of a sentence can be adjusted through extraordinary mitigation. This can be done in cases specified by law,[57] especially if the victim and the accused have been reconciled, if the damage has been repaired, or if the victim and the accused have agreed on how this will be done.[58] The concept of extraordinary mitigation entails that a sentence can be mitigated, to the point that the sentence imposed is lower than the minimum penalty for the offence concerned. Extraordinary mitigation may be applied if the minimum sentence is considered incommensurate with the case concerned.[59]

The Juvenile Justice Act (*Ustawa o postępowaniu w sprawach nieletnich*, UPSN) regulates victim-offender mediation for juvenile offenders. Juvenile offenders can be subjected to a measure that obliges them to apologise to the victim and repair any damage caused.[60] This obligation is one of the educational and corrective measures that in the UPSN aim at encouraging minors to accept their social and civic responsibilities.[61] Referrals to mediation on this basis must be made by the family judge and are generally

53 Art. 23a KPK, which replaced the previous Art. 320 KPK. Also, see B. Fellegi, *Meeting the Challenges of Introducing Victim-Offender Mediation in Central and Eastern European Countries*, Leuven: European Forum for Victim-Offender Mediation and Restorative Justice 2005, p. 39.
54 Fellegi 2005, pp. 38-39; Miers & Willemsens (eds.) 2004, p. 105; and Miers 2001, p. 50.
55 Fellegi 2005, p. 40.
56 B. Czarnecka-Dzialuk & D. Wójcik, 'Victim-Offender mediation in Poland', in: The European Forum for Victim-Offender Mediation and Restorative Justice 2000, p. 317.
57 Art. 60, para. 1 KK.
58 Art. 60, para. 2, under 1 KK.
59 Fellegi 2005, p. 40.
60 Art. 6, para. 2 UPSN.
61 Art. 65 UPSN.

made during preliminary proceedings. If the victim and the offender reach an agreement, this will be presented to the court at the sentencing stage.[62] The fulfilment of the agreement may lead to a mitigation of the sentence or to a change of the educational measures.[63]

Poland has no formal regulations on which offences qualify for a referral to victim-offender mediation. This holds true for cases with both adult and juvenile offenders.[64] As in Belgium, mediation outcomes vary from financial compensation to an apology by the offender.

2.4 Victim-Offender Mediation after Conviction and Sentencing

The third category of victim-offender mediation concerns mediation that takes place after the offender has been convicted and sentenced, and supplementary to criminal justice proceedings.[65] It is mainly serious crimes that qualify for this type of mediation, which, as a result, is most often executed while the offender is incarcerated. Here too, the use of mediation can be justified by taking the concept of *ultimum remedium* and the principle of subsidiarity into account. The crimes concerned are clearly considered too serious to involve victim-offender mediation prior to the conviction and sentencing of offenders, since this option has not been explored at an earlier stage. A successful outcome of the current type of mediation therefore neither leads to diversion, nor does it have any effect on the court's sentencing decision. The dialogue between victims and offenders will thus primarily be focused on repairing emotional harm. Consequently, the request to start a mediation after the offender has been convicted and sentenced is usually made by the victim or the offender.

In view of the above, the moment that the court has given its definitive ruling on a case can be termed as the lower limit of this modality of victim-offender mediation; mediation after that time can no longer influence the court's final decision. Theoretically, the upper limit can be considered non-existent, as mediation sessions can in principle be convened as long as both the victim and the offender agree to participate. However, this assumption may have undesirable consequences. For example, victims that are requested to engage in mediation regarding crimes committed a long time ago might be distressed by being confronted yet again with criminal events from the past. Moreover, not setting an upper limit might also encounter practical problems, such as having to trace a victim years after the crime was committed. It would therefore be wise to set an upper limit for mediation after conviction and sentencing too. The moment that offenders have served their sentence and thus paid their dues would be the logical choice; from

62 Art. 3a UPSN.
63 Fellegi 2005, pp. 39-40; and Czarnecka-Dzialuk & Wójcik 2000, pp. 313-314.
64 Fellegi 2005, p. 40; and Miers & Willemsens (eds.) 2004, pp. 106-107.
65 Groenhuijsen 2000, p. 72. Also, Miers 2001, p. 81.

that moment on, former prisoners are no longer regarded as offenders by the criminal justice system. Setting a deadline for mediation, however, should be left to the discretion of national jurisdictions.

Of the three categories of victim-offender mediation presented in this chapter, the modality discussed in this section is the least frequently used.[66] The existing programmes are primarily project-based and still experimental. As the outcome of mediation after conviction and sentencing cannot influence the court's final decision, this modality rarely has an extensive legal basis; it is mostly founded on general provisions stating that mediation is possible at all stages of the criminal justice process.[67]

Due to the relative scarcity of this modality of victim-offender mediation, and the absence of a specific legal basis, a discussion of two main examples similar to that in the previous sections cannot be presented here. Instead, below three manifestations of this modality will be addressed briefly.

Belgium has been experimenting with mediation between convicted offenders and their victims since June 2000, when the Belgian federal government decided that all prisons must develop a 'restorative-oriented system of detention'.[68] To this end, restorative justice advisors were appointed in every prison. Their duties included supporting the development of culture, skills, and programmes, which give room to the victim's needs and restorative answers.[69] In 2008, the position of restorative justice advisor was abolished and its tasks were assigned to the regional directional boards of the Directorate-General for Penitentiary Institutions (*Directoraat-Generaal Penitentiaire Inrichtingen*).[70] Also, in 2001, the mediation umbrella organisation *Suggnomè* had set up a mediation programme in three Flemish prisons, organising mediation sessions between victims and offenders on request with the help of mediators from the mediation-for-redress programme.[71] The main objective of these sessions was to establish a meaningful dialogue between the victim and the offender.[72]

The Netherlands uses various restorative measures, one of which was restorative mediation (*herstelbemiddeling*), which generally took place after the convicted offender had been sentenced. It focused on non-material or symbolic reparation, as well as on helping the victim and the offender to cope with the psychological consequences of the crime and its aftermath. This type of mediation was hoped to improve the quality of the lives of the parties involved, and to facilitate and stimulate the reintegration of the

66 Miers 2001, p. 79.
67 For example, see Art. 155a of the German StPO and Art. 553 of the Belgian WvSv.
68 Miers & Willemsens (eds.) 2004, p. 24.
69 Aertsen 2006, p. 73.
70 Directoraat-Generaal Penitentiaire Inrichtingen, *Activiteitenverslag 2008*, 2008, p. 24.
71 Aertsen 2006, pp. 72-73.
72 Miers & Willemsens (eds.) 2004, p. 26.

offender in society.[73] The project was nevertheless abandoned in 2003, not because the clients were dissatisfied, but because the founding organisations considered the project to be unsatisfactorily embedded in their organisations.[74] Currently, Dutch (mostly) juvenile detainees, their families, and their victims, are invited to engage in restorative meetings on a small scale.[75]

Finally, Poland also offers mediation to victims and offenders during the sentencing phase; the Polish prison service can initiate mediation during the term of an adult offender's custodial sentence.[76]

2.5 Conclusion

The existing forms of victim-offender mediation can be divided into three main categories; victim-offender mediation as a diversionary measure, as part of regular court proceedings, and after conviction and sentencing. The notion of *ultimum remedium* and the principle of subsidiarity justify the potential influence of mediation on the course or outcome of criminal proceedings. From criminal law theory it follows that a crime should be dealt with through the least radical reaction. As victim-offender mediation is generally considered to be such a more moderate response, it should be used whenever added value can be expected.

Victim-offender mediation is most commonly used before and during a criminal trial. These mediation modalities usually have a statutory basis. Their outcome may influence the course of the criminal justice proceedings; the prosecution may either be terminated (diversion) or the outcome of the mediation process may affect the court's sentencing decision (part of regular court proceedings). Mediation programmes that can lead to diversion generally deal with minor offences. Mediation during regular court proceedings can also address more serious crimes. The answer to the question which offences qualify for either the first or the second modality differs between countries.

The third category of mediation – mediation after conviction and sentencing – is rarely used but interest is growing. Mediation after a criminal trial generally lacks a detailed statutory basis. This is mainly due to the fact that its outcome cannot influence formal decisions of the prosecutor or the court. It is mostly applied in the case of serious offences, while the offender is incarcerated.

73 Miers & Willemsens (eds.) 2004, p. 88. Also, see Miers 2001, p. 42; and J.M.L.A. Frijns & J.H.M. Mooren, *Herstelbemiddeling. Een brug tussen slachtoffer en dader*, Utrecht: Uitgeverij de Graaff 2004.

74 J. Blad, 'A Critical View on the Netherlands', in: Aertsen, Daems & Roberts (eds.) 2006, pp. 102-103.

75 Blad 2006, p. 104.

76 Fellegi 2005, pp. 40-41; and Miers 2001, p. 50.

The categorisation of the various forms of victim-offender mediation has played a central part in this research. For each of the three modalities identified the role of confidentiality will have to be examined, but first the next chapter will turn to the procedural requirements for victim-offender mediation.

3 Standards for Victim-Offender Mediation

3.1 Introduction

Victim-offender mediation aims at establishing contact between a victim and an offender through the help of an impartial third party or mediator. To create a favourable setting for the interaction between the victim and the offender, penal mediation has to meet various requirements. These requirements secure and facilitate a proper progress and conclusion of the procedure. As a result, the interests of the victim and the offender are protected, and they are able to openly discuss their cares and concerns. The need for standards to regulate victim-offender mediation is generally acknowledged, and this has led to the national and international codification of these standards.

The Council of Europe and the United Nations have strived for international harmonisation of mediation norms. Both organisations have adopted detailed protocols concerning victim-offender mediation. In 1999, the Council of Europe issued the Recommendation on Mediation in Penal Matters,[77] and in July 2002 the Economic and Social Council of the United Nations adopted a resolution which notes the Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters (hereafter: Basic Principles).[78] Both documents include guidelines for national policymakers. The stipulations thus have no binding effect, but are intended to give orientation and support to those prepared and willing to use them.[79]

In some cases, the requirements of victim-offender mediation have been codified nationally. Various countries that offer victim-offender mediation have included a number of the standards in relevant legislation or policy documents.

In this chapter, the origin, ratio, and codification of the main requirements of penal mediation will be discussed. After a brief description of the most important standards, special attention will be paid to the main focus of this research, the principle of confidentiality.

77 Recommendation R (99)19, adopted on 15 September 1999.
78 Res/2002/12.
79 Explanatory Memorandum to the Recommendation, p. 20; and United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes*, New York: United Nations 2006, pp. 33-34.

3.2 Standards Applying to the Victim and the Offender

3.2.1 Acknowledgement of Basic Facts by the Victim and the Offender

Victim-offender mediation is a participatory procedure that focuses on communication between the victim and the offender. It enables victims to express their needs and feelings and offenders to accept and act on their responsibilities regarding the crime concerned.[80] To facilitate the establishment of a dialogue between both parties, certain conditions have to be met. One of these conditions is that the victim and the offender acknowledge the basic facts of a case. The reason for this is that it would be useless to start a mediation if the victim and the offender did not recognise the occurrence and circumstances of the crime. Without this mutual understanding, it would be impossible to reach an agreement. It is therefore considered 'conventional wisdom'[81] that the basic facts of a case should be acknowledged before the start of a mediation.[82]

The basic-facts requirement is included in the Council of Europe Recommendation and the United Nations Basic Principles. Both protocols state that the parties should acknowledge the basic facts of a case as a basis for mediation.[83] Furthermore, both documents add that participation in mediation should not be used as evidence of admission of guilt in subsequent legal proceedings. The legal notion of the offender's guilt is thus separated from the basic-facts recognition. This recognition should therefore not be considered an admission of guilt in the legal sense of the word, as this would infringe the presumption of innocence as laid down in Article 6, paragraph 2 of the European Convention on Human Rights (ECHR) and Article 14, paragraph 2 of the International Covenant on Civil and Political Rights (ICCPR).[84] The offender's acceptance of responsibility for what has happened is generally assumed to be sufficient.[85]

Various jurisdictions have incorporated the basic-facts standard in

80 *Statement on the Position of the Victim within the Process of Mediation* of the European Forum for Victim Services (2004). Further, see Chapter Two.

81 M.S. Groenhuijsen, 'Victim-Offender Mediation: Legal and Procedural Safeguards. Experiments and Legislation in some European Jurisdictions', in: The European Forum for Victim-Offender Mediation and Restorative Justice, *Victim-Offender Mediation in Europe. Making Restorative Justice Work*, Leuven: Leuven University Press 2000, pp. 77-78.

82 See also A. Duff, 'Restoration and Retribution', in: A. von Hirsch *et al*. (eds.), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?*, Oxford: Hart 2003, pp. 50-51.

83 Paragraph 14 of the Recommendation and Paragraph 8 of the Basic Principles.

84 Explanatory Memorandum to the Recommendation, p. 28. Also, see D. van Ness, 'Proposed Basic Principles on the Use of Restorative Justice: Recognizing the Aims and Limits of Restorative Justice', in: Hirsch *et al*. (eds.) 2003, pp. 168-169; and K. Lauwaert, *Herstelrecht en procedurele waarborgen*, Apeldoorn/Antwerp: Maklu 2008, pp. 110-112. The presumption of innocence will be discussed further in Chapter 4.3.4.

85 About the acknowledgement of basic facts and the implications for the question of guilt, see further Chapter 6.3.

domestic legislation. Offenders are often required to confess that they have committed the crime before they can participate in mediation. Alternatively, sufficient evidence to charge the offender must be available.[86] These requirements preclude issues from arising out of the separation of the notion of legal guilt and the acknowledgement of basic facts.

An example of the legal codification of this standard can be found in Austrian legislation, which requires a sufficient clarification of facts before a mediation can be initiated.[87] Furthermore, the offender has to be willing to take responsibility for the crime concerned.[88]

Apart from being incorporated in formal legislation, the basic-facts requirement can also be included in guidelines or be linked to a particular victim-offender mediation programme. Such instructions can be found in, for example, Poland. There, in the case of juvenile offenders, responsibility for the offence should be uncontroversially established before a mediation can be started. This provision is not incorporated in formal law.[89] A similar example of this practice can be found in Slovenia.[90]

3.2.2 Free and Voluntary Consent of the Victim and the Offender

A standard that guarantees the fairness of the mediation procedure and thus contributes to its success is the requirement that the victim and the offender participate voluntarily.[91] Since the parties in victim-offender mediation aim at reaching an agreement that is based on their true needs and feelings, it is essential that they participate of their own volition. The voluntariness applies to two aspects of the mediation procedure. The first is that the parties' decision to participate should be made freely and without pressure being exerted. The voluntary nature of their participation secures their commitment and cooperation, which are essential for the success of the process. This also implies that the victim and the offender may withdraw their consent to participate at any time, and thus end the mediation. The second aspect of voluntariness concerns the agreement, which should also be reached voluntarily. This is important to ensure that the parties feel satisfied with the outcome of the mediation and will carry out the agreement.[92] Neither the victim nor the offender should therefore be pressured into accepting the conditions of the agreement.

This standard is also inspired by the right to access to a court as laid down

86 Also, see Paragraph 7 of the United Nations Basic Principles. Furthermore, B. Hudson, 'Victims and Offenders', in: Hirsch *et al.* (eds.) 2003, p. 185.
87 Article 198, paragraph 1 of the Code of Criminal Procedure (*Strafprozessordnung*, StPO).
88 Art. 204, para. 1 StPO.
89 B. Fellegi, *Meeting the Challenges of Introducing Victim-Offender Mediation in Central and Eastern European Countries*, Leuven: European Forum for Victim-Offender Mediation and Restorative Justice 2005, p. 40.
90 Fellegi 2005, p. 58.
91 E.g., United Nations Office on Drugs and Crime 2006, p. 18.
92 T.F. Marshall, *Restorative Justice. An Overview*, London: Home Office 1999, p. 24.

in Art. 6 ECHR and Art. 14 ICCPR. This right comes into play especially when mediation is used as a diversionary measure. The offender's right to access to a court is curbed, when, as is generally the case, no appeal lies from a decision aborting the criminal justice process. Although offenders are unlikely to claim a violation of this right – they have, after all, voluntarily *consented* to participate in mediation and to the mediation agreement – the infringement of one of the fair-trial implications should be avoided if at all possible. It has, for instance, been proposed to consider the offender's decision to participate in victim-offender mediation as a waiver of the right to access to a court.[93] According to the European Court of Human Rights (ECtHR), a right covered by Art. 6 ECHR can be waived if certain conditions are met. For example, it is crucial that the waiver is made under the right circumstances, one of which is that offenders may not be pressured into agreeing to a penal measure – for example, victim-offender mediation – in order to conclude the case against them.[94]

Furthermore, the voluntary nature of the participation of offenders is important to ensure that they participate for the right reasons. Offenders should ideally take part in victim-offender mediation because they recognise the value of the procedure, and not because they expect the outcome of a trial to be worse.[95] Victim-offender mediation should not evolve into an easy way out for offenders; victims should not be confronted with offenders who are not dedicated to the mediation procedure.[96]

Additionally, it is of great importance that the victim is in no way pressured into taking part in victim-offender mediation.[97] Victims may start to feel guilty if they refuse to participate, because by doing so they will deny the offender an opportunity to benefit from mediation. This holds especially true for mediation programmes that are initiated and carried out by offender-oriented organisations. To avoid such situations, it is important to broach the subject of participation with the victim carefully; it has been suggested, for example, that a specially trained person be assigned to this task.[98]

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93 Lauwaert 2008, p. 257; I. Aertsen *et al.*, *Rebuilding Community Connections – Mediation and Restorative Justice in Europe*, Strasbourg: Council of Europe Publishing 2004, pp. 42-43; and Groenhuijsen 2000, p. 76.

94 ECtHR 27 February 1980, App. No. 6903/75, paras. 49-54 (*Deweer v. Belgium*), and more recently ECtHR 15 June 2004, App. No. 36256/97, para. 43 (*Thompson v. the United Kingdom*). See also, among others, C. van den Wyngaert, *Strafrecht, strafprocesrecht & internationaal strafrecht*, Antwerp/Apeldoorn: Maklu 2006, pp. 628-629.

95 M.S. Umbreit, *The Handbook of Victim-Offender Mediation. An Essential Guide to Practice and Research*, San Francisco: Jossey-Bass 2001, p. 202; and M.S. Groenhuijsen, 'Mediation in het strafrecht. Bemiddeling en conflictoplossing in vele gedaanten', *Delikt & Delinkwent* 2000, p. 445 (hereinafter: Groenhuijsen 2000a).

96 Due to the negative effect of an insincere attitude of the offender towards the victim. See further Chapter Six.

97 Umbreit 2001, p. 202.

98 M.S. Groenhuijsen, 'Een nieuw beleidsdocument van het "European Forum for Victim Services"', *Tijdschrift voor Herstelrecht* 2004-3, p. 45. Also, <www.euvictimservices.org>.

The free-and-voluntary-consent requirement has been incorporated in both the Council of Europe Recommendation and the United Nations Basic Principles. According to the definition of penal mediation in the Recommendation, the victim and the offender should freely consent to participate in a mediation process. This requirement is confirmed in Paragraph 1 of the Recommendation, which additionally states that the parties should be able to withdraw their consent at any time. Furthermore, the voluntariness of reaching an agreement is embedded in Paragraph 31. According to the Explanatory Memorandum, the required voluntariness of both aspects distinguishes mediation from traditional criminal justice proceedings and indicates that the parties in mediation 'own' their case to a large extent.[99] The standard of voluntariness is also included in Paragraph 7 of the United Nations Basic Principles.[100] Both the Recommendation and the Basic Principles emphasise that '[n]either the victim nor the offender should be induced by unfair means to accept mediation'.[101]

In principle, the voluntariness requirement applies to all victim-offender mediation programmes. Often, it is not laid down in formal legislation, but in guidelines for mediators or other professionals who are engaged in mediation. It is the responsibility of the professional approaching the victim and the offender to ensure that they can make a pressure-free decision. The voluntariness of the agreement should be safeguarded by the mediator during the mediation. Guidelines that contain such requirements can be found in, for example, the United States. Although there is no legislation on the subject, in the vast majority of the programmes victims and offenders reportedly participated voluntarily.[102]

In Austria, the voluntariness requirement has to a certain extent been incorporated in legislation. Art. 207 StPO, which concerns the accused's right to be informed about the diversion package regulations, states that the alleged offender must be informed that the use of the diversionary measures requires his agreement and that he can ask for continued prosecution if he so

In addition, United Nations Office on Drugs and Crime 2006, p. 66; and I. Aertsen, *Slachtoffer-daderbemiddeling. Een onderzoek naar de ontwikkeling van een herstelgerichte strafrechtsbedeling*, Leuven: Universitaire Pers Leuven 2004, pp. 252-253.

99 Explanatory Memorandum to the Recommendation, pp. 22-23 and 33.

100 See also Van Ness 2003, p. 168.

101 Paragraph 11 of the Recommendation. Paragraph 12(c) of the Basic Principles contains a similarly worded provision.

102 M.S. Umbreit, R.B. Coates & B. Vos, 'Victim-Offender Mediation: Three Decades of Practice and Research', *Conflict Resolution Quarterly* 2004-1/2, p. 284 (reportedly, 79 percent of the offenders participated voluntarily in the programmes reviewed, and 91 percent of the victims experienced their own participation in these programmes as voluntary); and Miers 2001, p. 75 (and references there). See also the Recommended Ethical Guidelines issued by the American Victim Offender Mediation Association (VOMA). Both the preamble and Section VI of these guidelines mention the requirement of voluntariness.

prefers.[103] The voluntary nature of victim-offender mediation is also included in the definition of mediation in Article 3ter of the Belgian Code of Criminal Procedure (*Wetboek van Strafvordering*, WvSv).

3.2.3 Right to Information

To enable the victim and the offender to make a free and voluntary decision about their participation in mediation, it is important that they are well aware of the implications of their choice.[104] As mentioned in Paragraph 10 of the Council of Europe Recommendation and Paragraph 13(b) of the United Nations Basic Principles, both the victim and the offender should be informed in detail about their rights, the nature of the mediation process, and the consequences of their decision to participate.[105] The Recommendation adds that '[m]ediation should not proceed if any of the main parties involved is not capable of understanding the meaning of the process'.[106] Another right that is linked to the right to information is the right to translation or interpretation,[107] which aims at enhancing the comprehensibility of the information provided to the victim and the offender.[108]

According to the Explanatory Memorandum, it is 'crucial' that the victim and the offender are aware of their procedural situation before agreeing to mediation.[109] The criminal justice authorities are responsible for providing them with the information they need. According to the Memorandum, the parties should be informed separately if this is necessary. In practice, the task of informing the victim and the offender is often left to the mediator. Nevertheless, it remains a responsibility of the police, the public prosecutor, the court, and other actors in the criminal justice field to alert the parties to the possibility of mediation.

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103 However, critics have pointed out that the voluntariness requirement is in danger of being overlooked in Austrian victim-offender mediation, because of the 'routinized and all-encompassing' use of mediation as a diversionary measure (V. Hofinger & C. Pelikan, 'Victim-Offender Mediation with Juveniles in Austria', in: A. Mestitz & S. Ghetti (eds.), *Victim-Offender Mediation with Youth Offenders in Europe*, Dordrecht: Springer 2005, pp. 177-178).

104 Lauwaert 2008, p. 259.

105 According to the European Forum for Victim Services, it would also be advisable to inform the victim about the possibility to obtain independent support and advice (*Statement on the Position of the Victim within the Process of Mediation* of the European Forum for Victim Services (2004)).

106 Paragraph 13 of the Recommendation. According to the Explanatory Memorandum, '[t]his rule excludes mediation in cases where one of the main parties is unable to comprehend the mediation process on intellectual grounds. These may be due to age or mental retardation, or a similar handicap'.

107 Paragraph 8 of the Recommendation and Paragraph 13(a) of the Basic Principles.

108 Minors also have the right to be assisted by a parent or guardian (Paragraph 13(a) of the Basic Principles). See also Paragraph 12 of the Recommendation; and p. 28 of the Explanatory Memorandum to the Recommendation.

109 Explanatory Memorandum to the Recommendation, p. 27.

Only a few jurisdictions that operate victim-offender mediation programmes have incorporated the right to information in legislation. The reason for this is that providing the parties with information generally follows logically from introducing victims and offenders to the mediation process. The obligation to inform the victim and the offender about the topics mentioned above is often codified in guidelines for mediators and other professionals involved in mediation. A long list of the information parties should receive from the mediator can, for example, be found in the Recommended Ethical Guidelines issued by the American Victim Offender Mediation Association (VOMA).[110] These guidelines oblige the mediator to inform both the offender and the victim during pre-mediation sessions. For example, the mediator should inform the parties about the mediation process itself, and about the resources available to them. Furthermore, the victim and the offender should be made aware of the confidential nature of victim-offender mediation and the resulting restrictions.[111]

3.2.4 Right to Legal Assistance/Counselling

Because of the relationship between victim-offender mediation and the criminal justice system, both the Council of Europe Recommendation and the United Nations Basic Principles state that the parties in mediation should be able to consult with a legal advisor. It adds to the free and informed consent of both the victim and the offender if they are given the opportunity to confer with a legal professional on the judicial consequences of their participation.[112]

Paragraph 8 of the Recommendation concerns the application of fundamental procedural safeguards, the right to legal assistance in particular, even though it does not specify when such assistance is required. Paragraph 13(a) of the United Nations Basic Principles states that 'the victim and the offender should have the right to consult with legal counsel concerning the restorative process'. This counsel should be provided before or after the mediation session.[113] The right to legal assistance does not entail that victims have a right to free legal assistance; it rather holds a duty for criminal justice officials to assist victims in obtaining legal advice or information.[114]

110 See <www.voma.org/docs/ethics.pdf>.

111 Sections II.6.c, II.8.c, and V.2, respectively.

112 Lauwaert 2008, p. 147.

113 Van Ness 2003, pp. 171-172 (NB: Please note that the numbering of the provisions in the Basic Principles changed after the completion of the paper by Van Ness). It should be mentioned here that Van Ness's paper discusses an older version of the Basic Principles (ECOSOC Res/2000/14, 2000), which phrased the standard at hand as a right that could be made effective 'before and after' the mediation process. Further, see J. Braithwaite, 'Principles of Restorative Justice', in: Hirsch *et al*. (eds.) 2003, p. 11.

114 Offenders generally have a right to legal representation based on Art. 6 ECHR and Art. 14 ICCPR. See also Van Ness 2003, pp. 170-171.

Although providing legal advice to the parties can be useful to assure informed consent, it also entails the risk of reducing the chances of reaching an agreement. The informal and independent nature of victim-offender mediation should not be jeopardised by involving legal professionals whose interests may not be best served by mediation; they may resist mediation because of their monopoly in litigation and their financial interests in using traditional procedures.[115] The legal support that is provided to the mediation parties should therefore be limited to advice before and after the procedure; legal assistance beforehand may contribute to the free and informed consent of the victim and the offender, while consultation afterwards may play a role in concluding the mediation agreement.[116] Victim organisations have expressed the fear that legal support *during* mediation might not contribute to a fruitful interaction between the parties.[117]

Domestic examples can be found in France, where legal aid is available to the parties in mediation, and in order to encourage mediation, its costs are covered.[118] Some Polish mediation programmes even allow lawyers to speak for their clients.[119] A number of other countries, such as Belgium[120] and Austria, offer legal assistance to the participants in mediation, but do not allow legal representation. In Austria, lawyers are often involved in the effort to start a victim-offender mediation, but the meeting itself is only attended by the victim and the offender.[121] Very few countries have incorporated the standard of legal assistance in legislation. Generally, existing provisions on legal aid and representation are followed, or regulation of legal assistance is left to victim-offender mediation professionals.

115 Groenhuijsen 2000, p. 77. See also J. Shapland, 'Restorative Justice and Criminal Justice: Just Responses to Crime?', in: Hirsch *et al*. (eds.) 2003, pp. 209-210; and C. Parker, *Just Lawyers. Regulation and Access to Justice*, Oxford: Oxford University Press 2003, p. 38.

116 The risk may exist that legal advisors consulted prior to mediation advise their clients to go to court instead (see also Lauwaert 2008, pp. 151ff.). However, the importance of informing the parties about their procedural position should be put before this potential risk, due to the contribution to their free and informed consent that can be expected from legal advice.

117 *Statement on the Position of the Victim within the Process of Mediation* of the European Forum for Victim Services (2004). This may not only be due to lawyers' financial interests (see above) in using traditional procedures, but also to the fact that they are, on the nature of their profession, not accustomed to round to conflict resolution based on consensus. See further Aertsen *et al*. 2004, p. 74.

118 Miers & Willemsens (eds.) 2004, p. 61; and Miers 2001, pp. 28-29. On the involvement of lawyers in mediation in France, see also J. Faget, 'The French Phantoms of Restorative Justice: The Institutionalization of Penal Mediation', in: I. Aertsen. T. Daems & L. Robert (eds.), *Institutionalizing Restorative Justice*, Devon: Willan Publishing 2006, pp. 162ff.

119 Fellegi 2005, p. 44; and Miers & Willemsens (eds.) 2004, p. 108.

120 E.g., Lauwaert 2008, 164ff. (legal assistance in the mediation-for-redress programme); Miers & Willemsens (eds.) 2004, p. 26; and Miers 2001, p. 12 (both pertaining to penal mediation). See also Aertsen 2004, pp. 252-254.

121 Miers & Willemsens (eds.) 2004, p. 18; and Miers 2001, p. 10.

3.2.5 Equality between the Parties

To enable the dialogue between the victim and the offender, it is important that no great differences or inequalities exist between them, as these may prevent the parties from talking about their cares and concerns. To avoid this from happening, disparities between the parties should be taken into account when selecting cases for mediation.

Both the Council of Europe and the United Nations have included the standard of equality in their protocols. The United Nations Basic Principles provides in Paragraph 9 that cultural differences and power imbalances should be taken into consideration when referring a case to mediation, or when conducting a mediation process. Factors such as differences in age, maturity, or intellectual capacity can hamper the communication between the victim and the offender if they cannot discuss the crime as equals.[122] Paragraph 15 of the Council of Europe Recommendation states that obvious disparities between the parties should be considered before a case is referred to mediation. To further free participation and true consent to the agreement, major power imbalances and implicit or explicit threats of violence should be avoided. Nevertheless, whether a case is unsuitable for mediation due to disparities between the parties largely depends on the circumstances of a case. Many discrepancies in power and skills can possibly be corrected by the mediator, who can seek to redress the balance in favour of the disadvantaged party.[123] It is therefore important that the mediator carefully explores whether inequalities between the parties as mentioned here are likely to actually frustrate the mediation, and what can be done to neutralise such differences.

As the equality standard is closely linked to the selection of cases that are referred to victim-offender mediation, it is generally not incorporated in domestic legislation of countries that operate mediation programmes. The decision whether a case is unsuitable for mediation due to disparities between the victim and the offender is left to the discretion of the referrer, or, at a later stage, the mediator.

3.3 Standards Applying to the Mediator

The success of a victim-offender mediation largely depends on mediators and on how they conduct the process. To be able to perform their task properly, mediators have to meet certain requirements. These qualities concern, among other things, their background (mediators should be recruited from all sections of society and should be familiar with local

122 Van Ness 2003, p. 169.
123 Explanatory Memorandum to the Recommendation, pp. 28-29.

cultures and communities)[124] and their personal capacities (mediators should be able to demonstrate a sound judgement and possess good interpersonal skills).[125] A mediator whom the parties can relate to and who is able to support and stimulate a fruitful exchange between the parties will contribute to a successful outcome of the mediation. Therefore, various standards have been adopted that address the training of mediators and their role during the mediation.

3.3.1 Training of the Mediator

To prepare mediators for their task in mediation, they must be properly trained. Education concerning the specific needs and characteristics of victim-offender mediation will enable the mediator to contribute optimally to its success.[126]

The importance of mediator training has been recognised by the Council of Europe and the United Nations. According to their protocols, mediators should receive training both before they start working as a mediator and during the course of their work.[127] Such training should pay attention to the qualities that the mediator should possess as well as enhance the mediator's capacities to properly conduct a conflict resolution procedure. Furthermore, it should develop the mediator's awareness of the nature of victim-offender mediation and its participants. Special attention should be paid to specific problems regarding victims and victimisation, and to social issues related to offenders.[128]

As well-trained mediators are vital to successful victim-offender mediation, most jurisdictions that use mediation oblige mediators to take training courses. Because of the variety in mediation programmes, the mediator capacities deemed necessary may differ between countries. The set-up of training programmes is generally not covered by domestic legislation, but is usually left to the organisations that operate the mediation programmes. In Finland, for example, the Finnish Mediation Association has prepared a handbook that sets out training activities for mediators,[129] which must be carried out uniformly throughout the country. Austria also offers a detailed training programme to mediators.[130] Austrian mediators must possess a qualification in social work and they must engage in initial as well

124 Paragraph 22 of the Recommendation and Paragraph 19 of the Basic Principles.
125 Paragraph 23 of the Recommendation.
126 Aertsen *et al*. 2004, pp. 54ff.
127 Paragraphs 20 and 24 of the Recommendation, and Paragraphs 12 and 19 of the Basic Principles.
128 Explanatory Memorandum to the Recommendation, p. 31; and Van Ness 2003, p. 174.
129 Miers & Willemsens (eds.) 2004, p. 56; Miers 2001, p. 25; and J. Iivari, 'Victim-Offender Mediation in Finland', in: The European Forum for Victim-Offender Mediation and Restorative Justice 2000, pp. 196-197.
130 Miers & Willemsens (eds.) 2004, p. 17; Löschnig-Gspandl 2004, p. 39; and Miers 2001, p. 8.

as follow-up training activities. In Germany, the training requirements that mediators must meet may differ between regions, since each *Servicebüro* (service agency, the German institution responsible for the operation of victim-offender mediation programmes) issues its own training standards. In practice, however, these standards generally overlap and resemble those of other jurisdictions.[131] The training obligation may also differ between countries. For example, in Germany, participation in the training programme is voluntary, while in Austria, training is compulsory.

3.3.2 Impartiality of the Mediator

A requirement that is crucial to the success of mediation is the mediator's impartiality.[132] The mediator must adopt an impartial attitude towards the parties and must avoid an appearance of being biased towards either of them. Nevertheless, the impartiality standard does not entail that the mediator must treat the parties equally.[133] The parties in victim-offender mediation take different positions; one party has caused harm to the other, and it is up to the offender make things right. Mediators should recognise this difference between the parties and act accordingly.[134] They should ensure that the parties can communicate freely and reach an agreement that meets their interests and wishes.[135] However, they should be careful not to express any judgement on the question of the offender's legal guilt.

The impartiality of the mediator has been laid down in the Council of Europe Recommendation (Paragraph 26) and the United Nations Basic Principles (Paragraphs 5 and 18). It is also mentioned in the Recommendation's definition of penal mediation, which speaks of an 'impartial third party' that should conduct the mediation. The Basic Principles additionally mention impartiality as a requirement in its definition of 'facilitators'.[136]

Both protocols justify the incorporation of the impartiality standard on the grounds mentioned above.[137] The Explanatory Memorandum adds to this that the impartiality standard does not exclude criminal justice personnel from conducting a mediation. However, the prosecutor in charge of a case that is referred to mediation should naturally not be allowed to become involved in the mediation process in that case.

131 Miers & Willemsens (eds.) 2004, p. 70; and Miers 2001, p. 35.
132 H. Astor, 'Mediator Neutrality: Making Sense of Theory and Practice', *Social & Legal Studies* 2007-2, p. 222.
133 Lauwaert 2008, pp. 229ff.
134 Aertsen *et al*. 2004, pp. 43-44.
135 In this respect, see also the standard of equality (Section 3.2.5): the mediator can redress the balance between the victim and the offender, and this may involve different approaches.
136 Paragraph 5 of the Basic Principles.
137 See the Explanatory Memorandum to the Recommendation, pp. 31-32; and Van Ness 2003, pp. 173-174.

Even though the impartiality standard is not commonly incorporated in domestic legislation, it is often addressed in mediator training programmes. For example, the Recommended Ethical Guidelines issued by the American VOMA contain a section on the impartiality and neutrality of the mediator.[138] According to these guidelines, the mediator's impartiality entails 'freedom from favoritism or bias' as well as a 'commitment to aid all participants' without playing 'either an adversarial or advocacy role'.[139] The guidelines also address neutrality, prior and post-mediation relationships with one of the participants, and conflicts of interest.[140]

3.4 Procedural Standards

3.4.1 Victim-Offender Mediation at All Stages of Criminal Proceedings

In the previous chapter, the three main categories of victim-offender mediation were described. Victim-offender mediation can take place before, during, or after a criminal justice process. The use of these mediation modalities differs between countries. Some have implemented only one modality, others two or all three modalities.[141] Which modality is used in a certain country may depend on factors such as its national criminal policy and the structure of its legal system.

Although not all countries use the available modalities of penal mediation, the idea that victim-offender mediation can be used at all stages of the criminal justice process is generally recognised and has been included in the Council of Europe Recommendation[142] and the United Nations Basic Principles.[143] From the Basic Principles it follows that the choice for the modality of mediation to be used is left to the discretion of national policymakers. The Explanatory Memorandum to the Recommendation stresses the importance of the availability of mediation at various stages of the criminal justice process; in this way, parties that do not feel ready to participate in mediation at an early stage can do so later, while conflicts that need to be settled quickly can also be dealt with through mediation.[144]

The availability of mediation at all stages of criminal proceedings has remained largely uncodified.[145] Its implementation rather follows from the fact that various jurisdictions operate mediation programmes at different stages of the criminal justice process (examples of which were discussed in

138 See <www.voma.org/docs/ethics.pdf>.
139 Section IV.1.
140 Sections IV.2-IV.5.
141 See also United Nations Office on Drugs and Crime 2006, pp. 13 and 17-18.
142 Paragraph 4 of the Recommendation.
143 Paragraph 6 of the Basic Principles.
144 Explanatory Memorandum to the Recommendation, p. 24. See also Aertsen *et al*. 2004, p. 44.
145 Examples of legal provisions can be found in Chapter Two.

the previous chapter).

3.4.2 Reasonable Time Frame

To avoid frustration on either side or secondary victimisation,[146] it is important that decisions resulting from a victim-offender mediation are taken without delay. There are various situations that require a quick response, especially if they are connected to the beginning or conclusion of a mediation procedure. The Council of Europe Recommendation and the United Nations Basic Principles contain a number of relevant provisions.

After a case has been referred to mediation, the mediator will usually explore whether it is suitable for mediation, and whether the victim and the offender are willing to participate. Usually, the regular criminal justice process is suspended during this phase. If the attempts to start a mediation fail, the case will be referred back to the criminal justice authorities and it then becomes important to prevent further delay. As follows from Paragraph 11 of the Basic Principles, a decision on how to proceed should be taken as soon as possible. Paragraph 16 of the Recommendation adds that the decision to refer a case to mediation should be accompanied by a reasonable time limit. Within this time limit, the criminal justice authorities should be kept informed of the progress of the mediation procedure in order to avoid unnecessary delays.[147] Nevertheless, mediation should be conducted 'at a pace that is manageable for the parties'.[148]

If a mediation ends due to a lack of agreement, the decision on how to proceed should be taken promptly. The same applies when the implementation of the mediation agreement fails.[149] In these cases, the mediation has been unsuccessful, and to avoid a further delay of the regular criminal justice process, a quick response is needed.[150] Furthermore, it is important that both the victim and the offender know where they stand after the failure of the mediation, and are informed about what will happen next as soon as possible.

A country that has implemented this quick-response requirement in its legislation on victim-offender mediation is Germany. Article 153a, paragraph 1 of the German Code of Criminal Procedure (*Strafprozessordnung*, StPO) provides that the public prosecutor can set a six-month deadline for the offender to make a decision about the offer to participate in victim-offender mediation.

146 'Secondary victimisation' has been defined as '[v]iolations of rights and entitlements which victims claim after having been victimized' (L. Montada, 'Injustice in Harm and Loss', *Social Justice Research* 1994-1, p. 7). In this respect, see also U. Orth, 'Secondary Victimization of Crime Victims by Criminal Proceedings', *Social Justice Research* 2002-4, p. 314.

147 Explanatory Memorandum to the Recommendation, p. 29.

148 See also Paragraph 28 of the Recommendation.

149 Paragraph 18 of the Recommendation, and Paragraphs 16 and 17 of the Basic Principles.

150 Van Ness 2003, pp. 171-172.

3.5 Principle of Confidentiality

Confidentiality is one of the main requirements of penal mediation and is at its very foundations. The private nature of victim-offender mediation plays a crucial role in realising its potential. In this section, the reasons for and codification of the principle of confidentiality will be described.

3.5.1 Development and Ratio

Victim-offender mediation aims at enabling victims and offenders to freely express their cares and concerns, so that they can reach an agreement that is based on their genuine needs and feelings. These need not have legal significance only, but may also concern personal information. To facilitate the exchange between the victim and the offender, an environment should be created where both parties can express themselves without reservation.

During a mediation, the victim and the offender will usually talk about their experiences, needs and interests that result from the crime concerned. As mentioned before, both parties should acknowledge the basic facts of a case before the start of a mediation. During the mediation process itself, they can discuss what has happened and how this has affected them.[151] For example, offenders can explain what circumstances led them to commit the crime, and how they selected the victim.[152] Victims can explain the effects the crime has had on them, for example, the fear of going out or of being home alone. It is also conceivable that the victim is suffering from trauma as a result of the crime. These and similar topics can be explored by the parties in the course of mediation. This discussion of the crime, the events leading up to it, and its aftermath are a significant part of any mediation procedure, because mutual recognition and understanding are necessary to achieve an agreement. Another important element of victim-offender mediation is the focus on the future.[153] Especially victims should be given the opportunity to state their expectations with regard to offenders. They may, for example, request financial compensation, an apology, or the participation of the offender in community service. Offenders can also express what they are prepared to offer the victim in terms of material and immaterial compensation. The parties may then reach an agreement on how the offender will redress the harm that has been caused to the victim.

According to the principle of confidentiality, all information of this kind exchanged between the victim and the offender should be kept secret (unless otherwise stipulated in the agreement). This also follows from how this standard has been formulated in international and national legislation (see below). The main reason for the advocated confidentiality of all mediation information is that the potential disclosure of the information concerned

151 Duff 2003, p. 50.
152 United Nations Office on Drugs and Crime 2006, p. 87.
153 Duff 2003, p. 55.

may deter the victim and the offender from taking part in victim-offender mediation. They may not feel free to discuss their needs and feelings when privacy is not guaranteed. The information that is disclosed by offenders may harm their position during subsequent legal proceedings. They may, for example, incriminate themselves when they explain the circumstances that led them to commit the crime. If the mediation setting does not offer guaranteed confidentiality, the offender may decide not to participate. Victims may also feel uncomfortable with the idea that the information they share is open to disclosure. If they explain the psychological consequences of the crime during the mediation, they may well prefer that such personal and sensitive information remains confidential.[154]

Ensuring the participation of the victim and the offender is one of the main reasons for the confidential nature of victim-offender mediation. The principle of confidentiality is also inspired by the idea that a private setting contributes to a fruitful exchange between the parties. If the victim and the offender feel free to exchange their needs and interests, they may be more likely to come to an agreement.[155] However, they may be more reticent if certain issues can be disclosed afterwards.[156] As a result, the principle of confidentiality does not only play a role before a mediation has started, when it bears on the decision to take part, but also during the mediation process itself, when it concerns the exchange of relevant information.

A third reason for the confidential character of victim-offender mediation concerns the nature of the process as compared to that of the criminal justice system. Victim-offender mediation is a private procedure, while a criminal trial is open to the public.

The criminal justice system generally produces a repressive reaction to crime on behalf of society. It holds perpetrators of a crime publicly accountable for their actions. Traditionally, victims play no role in the administration of justice. Their interests are represented by the public prosecutor. The prosecutor can take offenders to court to have them judged by an impartial tribunal. The court has been given the task of determining the guilt of the alleged offender. If the accused is found to have broken the law – the rules of society – he or she can be punished by the court. For the sake of transparency and controllability, criminal proceedings should be held in open court.[157]

154 J. Dignan *et al.*, 'Staging Restorative Justice Encounters against a Criminal Justice Backdrop: A Dramaturgical Analysis', *Criminology and Criminal Justice* 2007-1, pp. 19-20.

155 For example, it might be more advantageous to all persons involved when the offender apologises in a private setting, since an apology in a public setting may have deleterious effects and may lead, among other things, to more anger and moral indignation (C.J. Petrucci, 'Apology in the Criminal Justice Setting: Evidence for Including Apology as an Additional Component in the Legal System', *Behavioral Sciences and the Law* 2002-4, p. 346).

156 See also Braithwaite 2003, pp. 10-11.

157 Also, see A. von Hirsch, A. Ashworth & C. Shearing, 'Specifying Aims and Limits for Restorative Justice: A 'Making Amends' Model?', in: Hirsch *et al*. (eds.) 2003, p. 34.

The purpose of victim-offender mediation is not to respond repressively to crime and to inflict a penalty on the perpetrator. It rather deals with the needs of both the victim and the offender after a crime has been committed. The main object of penal mediation is to establish a dialogue between the parties. For this reason, victim-offender mediation does not require public access for reasons of transparency and controllability, nor does it need to be performed in a public setting. Whether mediation is considered part of the criminal justice system or a separate procedure is not particularly pertinent; the central relationship remains that between the victim and the offender. However, this does not mean that the quality of mediation outcomes and the execution of the mediation agreement should not be supervised.[158] The extent of publicity that is needed for such quality control is logically defined by the level of confidentiality that is necessary to guarantee the quality of victim-offender mediation procedures.[159]

3.5.2 Codification

The principle of confidentiality has been codified in both the Council of Europe Recommendation and the United Nations Basic Principles. Paragraph 2 of the Recommendation states:

> Discussions in mediation are confidential and may not be disclosed subsequently, except with the agreement of the parties.

Paragraph 14 of the Basic Principles reads as follows:

> Discussions in restorative processes that are not conducted in public should be confidential, and should not be disclosed subsequently, except with the agreement of the parties or as required by national law.

Both provisions are based on the reasons above. The encouragement of participation in mediation and a free exchange during the procedure are considered to be the main grounds for incorporating the confidentiality rule,[160] especially concerning the exchange of incriminating or legally irrelevant information.[161]

Additionally, both protocols include exceptions to the principle of confidentiality, stating that an exception should be made if the parties agree on the disclosure of certain information. During the mediation, the victim and the offender may negotiate the confidentiality of the information being discussed. If they agree that talking about certain matters is allowed after the mediation has been concluded, the principle of confidentiality no longer

158 See further Section 3.6.3 and Chapter Seven.
159 Lauwaert 2008, p. 294; and further D. Roche, *Accountability in Restorative Justice*, Oxford: Oxford University Press 2003.
160 See also United Nations Office on Drugs and Crime 2006, p. 34.
161 Van Ness 2003, p. 171.

applies to these issues. Moreover, the Basic Principles state that an exception should be made if national law requires the disclosure of information.[162]

Various implications of the principle of confidentiality have been codified in both international protocols. Below, the provisions concerned will be briefly described.

The Council of Europe Recommendation and the United Nations Basic Principles both add to the required acknowledgement of basic facts that participation in mediation should not be used as evidence of admission of guilt in subsequent legal proceedings.[163] The Explanatory Memorandum to the Recommendation additionally states that a confession of guilt made by the alleged offender in the context of a mediation should also be kept out of court.[164]

One of the Council of Europe Recommendation provisions which addresses the confidential nature of victim-offender mediation is Paragraph 29, which reads that '[m]ediation should be performed *in camera*'. In other words, victim-offender mediation sessions should not be publicly accessible. According to the Explanatory Memorandum, the objective of this provision is to provide confidence between the parties and the mediator.[165] The Recommendation also lists a number of reporting duties of the mediator. In the first place, 'the mediator should convey any information about imminent serious crimes, which may come to light in the course of mediation, to the appropriate authorities or to the persons concerned'.[166] The mediator's obligation to notify the authorities corresponds to national law requirements regarding the reporting and prevention of such crimes.[167] Secondly, Paragraph 32 of the Recommendation states that the mediator should report on the steps taken during the mediation and on its outcome to the criminal justice authorities. To avoid infringing confidentiality, '[t]he mediator's report should not reveal the contents of mediation sessions, nor express any judgment on the parties' behaviour during mediation'.[168] If the mediation is unsuccessful, the mediator's report should try to briefly indicate the reasons.[169]

The United Nations Basic Principles also address the topic of a failed mediation. Paragraphs 16 and 17 respectively state that failure to reach an agreement should not be used in subsequent criminal justice proceedings,

162 Although the Council of Europe Recommendation does not contain a similar provision, the same condition applies, since both protocols have the status of guidelines and therefore cannot overrule national law.
163 Paragraph 14 of the Recommendation, and Paragraph 8 of the Basic Principles.
164 Explanatory Memorandum to the Recommendation, p. 23.
165 Explanatory Memorandum to the Recommendation, p. 32.
166 Paragraph 30 of the Recommendation.
167 Explanatory Memorandum to the Recommendation, p. 33.
168 Paragraph 32 of the Recommendation.
169 Explanatory Memorandum to the Recommendation, p. 33.

and that failure to implement an agreement should not lead to a more severe sentence. The parties should not be required to explain the failed mediation, since this may breach confidentiality. Furthermore, the voluntary nature of the parties' participation might be endangered, because they will not be able to withdraw without consequences. There is also the risk that discussing the causes of an unsuccessful mediation will legalise the process. For the same reasons, the court should not investigate the causes of the failed mediation. The causes of failure to reach an agreement or to implement an agreement should therefore not play a role in subsequent proceedings or in imposing a sentence. Hence, an unsuccessful mediation or a failed implementation of a mediation agreement should be considered merely an incentive to resume criminal justice proceedings.[170]

The importance of the confidential nature of victim-offender mediation is also recognised nationally. Practically all domestic victim-offender mediation programmes start from the idea that mediation should take place in a private setting. The principle of confidentiality has been secured in, for example, formal legislation, ministerial regulations, and guidelines for professionals that are engaged in mediation.

Belgium has devoted a great deal of attention to the principle of confidentiality in its legislation on victim-offender mediation. The private nature of penal mediation is mentioned several times in the WvSv. Art. 3ter WvSv contains a definition of penal mediation, and confidentiality is mentioned as one of its main elements. Art. 555, para. 1 WvSv states that all mediation-related documents and all party statements are confidential. As a result, such information cannot be used as evidence in any subsequent procedure, be it criminal, civil, administrative, or arbitral. Furthermore, the statements concerned cannot be used as an extrajudicial confession. The victim and the offender can, however, agree on the disclosure of certain issues.[171] According to para. 2 of Art. 555 WvSv, documents that are revealed contrary to this provision will be officially kept out of the court discussions. Finally, paragraph 3 states that mediators cannot disclose anything that they have learned by virtue of their profession. In addition, they cannot be called as a witness in any of the procedures mentioned above, unless they are obliged by law to give testimony. If mediators violate these rules, they can be punished with imprisonment or a fine.[172] The JBW provides a similar set of rules.[173]

Other countries that operate victim-offender mediation programmes, such

170 Van Ness 2003, pp. 171-173.
171 See also Arts. 163 and 195 WvSv.
172 Art. 555, para. 3 WvSv in conjunction with Article 458 of the Belgian Criminal Code (*Wetboek van Strafrecht,* WvSr).
173 Art. 37quater, para. 3 JBW.

as Poland[174] and Norway,[175] have included the principle of confidentiality in subsidiary legislation, for example, ministerial regulations.

The confidential nature of penal mediation is also referred to in guidelines that apply to mediation professionals, such as the VOMA Recommended Ethical Guidelines. Section V of these guidelines includes a number of provisions on the topic of confidentiality. It addresses, for example, the limits of confidentiality, the consequences of wrongful disclosure, the release of information by the mediator after the mediation has been concluded, and the storage and disposal of records.[176] According to these guidelines, the mediator also has the duty to inform the parties about the limitations of the mediation's confidentiality (such as statutorily or judicially mandated reporting) and about the circumstances under which a mediator is compelled to testify in court.

3.6 Frictions Caused by the Principle of Confidentiality

Victim-offender mediation in a confidential setting stimulates the participation in and communication during the session. Nevertheless, it does not function as a stand-alone procedure; it plays a role within the framework of criminal and civil law.[177] The outcome of a mediation can influence the course and outcome of the criminal justice process. Furthermore, penal mediation can be followed by civil litigation. Because of the interaction between victim-offender mediation and these legal concepts, the confidentiality principle may conflict with norms and values of criminal and civil law. This section aims at identifying such frictions and will also address problems that occur outside the legal area.

3.6.1 Out-of-Court Disclosure to Third Parties

From the phrasing of the principle of confidentiality in the Council of Europe Recommendation and the United Nations Basic Principles, it follows that all those involved in mediation (namely the victim, the offender, the mediator, and trusted third parties) are expected to remain silent about things said and done during the mediation. None of the participants in mediation is allowed to divulge mediation-related information. The strict interpretation of the confidentiality rule advocated by the two protocols leads to the conclusion that the ban on disclosure extends to out-of-court statements. The participants in victim-offender mediation are initially

174 Fellegi 2005, p. 44 (the regulations are, however, incomplete on the subject of confidentiality).
175 Miers & Willemsens (eds.) 2004, p. 101; and Miers 2001, p. 46.
176 See <www.voma.org/docs/ethics.pdf>.
177 See, e.g., H. Zehr, 'Commentary: Restorative Justice: Beyond Victim-Offender Mediation', *Conflict Resolution Quarterly* 2004-1/2, p. 312.

forbidden to talk about their experiences with friends or family. The same goes for organisations or institutions that are part of the community of the victim and the offender, such as the media or schools.[178]

The consequences of this strict confidentiality may have drawbacks for the participants in mediation. The victim and the offender may feel isolated or ill-understood if they are not allowed to share their mediation experiences with their social network.[179] For the victim, meeting the offender usually is an imposing event,[180] and re-victimisation should be avoided.[181] The advocated extent of the principle of confidentiality may therefore be questioned, considering that it implies that the victim and the offender are not allowed to talk to anyone about the process they have been involved in.[182]

3.6.2 Offender-Related Issues

3.6.2.1 Behaviour of the Offender Frustrating the Success of the Mediation

It is conceivable that information about imminent serious crimes comes to light during a mediation. According to Paragraph 30 of the Council of Europe Recommendation, the mediator should convey such information to the appropriate authorities. The crimes concerned may be crimes offenders are planning to commit, or crimes that they know others will commit. It is also possible that the offender commits another crime against the victim during the mediation, for example, a threat of violence.

It goes without saying that especially the latter situation may have serious drawbacks for the victim. Currently, the victim is unable to report such situations, because the behaviour of the offender during the mediation cannot be taken into account in subsequent proceedings. The mediator must report crimes, but only if they are of a serious nature. Information about crimes that cannot be regarded as being of a serious nature should be kept secret, and victims are thus left empty-handed; they cannot disclose information about crimes after a mediation has been concluded. Such information will remain confidential if the crimes concerned are not considered serious, even though the victim may experience them as such, irrespective of how they are qualified by domestic law.[183] Moreover, the

178 See also Van Ness 2003, p. 171.

179 *Statement on the Position of the Victim within the Process of Mediation* of the European Forum for Victim Services (2004); and Duff 2003, p. 46.

180 See also H. Strang, *Repair or Revenge: Victims and Restorative Justice*, Oxford: Clarendon Press 2002, pp. 56-57; and P.A. Wyrick & M.A Constanzo, 'Predictors of Client Participation in Victim-Offender Mediation', *Mediation Quarterly* 1999-3, p. 255.

181 United Nations Office on Drugs and Crime 2006, p. 59.

182 The question of enforceability will be addressed in Chapter Five.

183 Committing a new crime against the victim in the supposedly 'safe' mediation environment is likely to cause the victim severe distress, especially because the victim may suffer secondary victimisation if he considers the offender's expressions of regret and apologies to be insincere. See, e.g., A. Opdebeeck, G. Vervaeke & F.W. Winkel, 'Bemiddeling in het strafrecht', in: P.J. van Koppen *et al*. (eds.), *Het Recht van Binnen*,

mediation process is likely to be frustrated by statements of the offender pertaining to other crimes, or by the commission of another crime during the mediation. The current scope of the principle of confidentiality may therefore cause additional distress for the victim and secondary victimisation.[184]

3.6.2.2 Confessional Statements by the Offender

From the two protocols it follows that the participation of offenders in mediation and their acknowledgement of the basic facts of a case should not be regarded as a confession of legal guilt. Although it is questionable how the acknowledgement of facts can be separated from the acceptance of legal guilt,[185] the fact that confessional statements of the offender are not open to disclosure may lead to burdensome situations for the victim, particularly when offenders withdraw their confession after the mediation has ended. After all, all communication during the mediation is subject to confidentiality, and, as a result, neither the victim nor the other mediation participants can disclose in court a confession made by the offender during the mediation. This may especially have drawbacks since it is unlikely that an offender, who has not committed the crime concerned, will agree to take part in victim-offender mediation.[186]

3.6.3 Outcome-Related Issues: Implementation Failure

A successful victim-offender mediation will in most cases be concluded with an agreement between the victim and the offender. This agreement will lay down obligations the offender has to fulfil in order to compensate the harm caused to the victim. For example, the offender may have to pay restitution to the victim or perform community service. However, if an offender does not meet the agreed obligations, this may conceivably be to the detriment of the victim. The offender's fulfilling of the mediation agreement can be considered the ultimate recognition of the victim's needs and feelings that have been discussed during the mediation.[187] Failure to implement the mediation agreement may cause the victim to feel frustrated and distressed.[188] The current scope of the principle of confidentiality prevents

Deventer: Kluwer 2002, pp. 941-942. For a more detailed explanation of the effects of an apology on the well-being of victims, see Chapter Seven.

184 *Statement on the Position of the Victim within the Process of Mediation* of the European Forum for Victim Services (2004).

185 See also Lauwaert 2008, p. 114.

186 See also The European Forum for Victim Services, *Statement on the position of the victim within the process of mediation* (2004); and Groenhuijsen 2000, p. 78.

187 United Nations Office on Drugs and Crime 2006, p, 61.

188 J. Blad, 'De betekenis van de overeenkomst. Toezien op en nakomen van afspraken', *Tijdschrift voor Herstelrecht* 2007-2, p. 11; United Nations Office on Drugs and Crime 2006, p. 68; J. Latimer, C. Dowden & D. Muise, 'The Effectiveness of Restorative Practices: A Meta-Analysis', *The Prison Journal* 2005-2, p. 141; and A. Morris & G.

the victim from talking about such issues and from reporting the offender's non-performance.[189] As a result, the victim is left empty-handed and seemingly cannot disclose the implementation failure.[190]

3.6.4 Procedural Position of the Mediation Participants

A victim-offender mediation may be followed by a legal procedure. The first (in the case of a failure) and the second modality of penal mediation can be followed by a criminal trial, and all three mediation modalities can be followed by civil litigation. The information that has been discussed during the mediation may be relevant in the light of ensuing legal proceedings. Mediation participants may therefore be asked to make a statement or to give testimony about what has happened in mediation. The position of each of the participants has specific characteristics. The victim, the offender, the mediator, and the professional caregiver may all play different roles during legal proceedings that follow a mediation.

A confrontation between the confidentiality standard and rules of the legal system may give rise to friction. The main friction concerns the legal obligation to give testimony. Most jurisdictions have legislation that compels witnesses to make a statement if they have been summoned in that capacity.[191] The only option for a witness to refrain from making a statement is to appeal to a privilege to refuse to testify. In the context of victim-offender mediation, this mainly applies to the professional caregivers who are entitled to a professional privilege. Other mediation participants are generally obliged by law to give testimony. As information from a mediation may be relevant to subsequent proceedings, it is conceivable that the hearing of a mediation participant will include questions about the mediation process. In this respect, a conflict arises between the mediation's confidential environment and the legal duty to appear as a witness; the principle of confidentiality prohibits the mediation participants from disclosing information, while the legal duty to testify obliges them to make a statement.[192]

In civil litigation, the victim, the mediator, and the professional caregiver, as well as the offender can be called as witnesses (see below). In criminal proceedings, the first three participants can appear as witnesses as well,

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Maxwell, 'Restorative Justice in New Zealand: Family Group Conferences as a Case Study', *Western Criminology Review* 1998-1, pp. 8-9.

189 This has also been put into words as such in the United Nations Basic Principles, Paragraphs 16 and 17.

190 On this topic, see also the *Statement on the Position of the Victim within the Process of Mediation* of the European Forum for Victim Services (2004).

191 This is the case in most common-law and civil-law countries. For more detailed examples of domestic legislation concerning the obligation to give testimony, see Chapter Eight.

192 See also the *Statement on the Position of the Victim within the Process of Mediation* of the European Forum for Victim Services (2004).

however, in a criminal trial the position of offenders is different. As the accused, they can appeal to the right to a fair trial laid down in the ECHR and the ICCPR. The right to a fair trial entails that offenders cannot be forced to incriminate themselves. This implies that they have a right to remain silent. Furthermore, the fair-trial notion implies that alleged offenders have the right to defend themselves, which entails that they have a right to speak. The right to remain silent creates no tension in this respect; it enables offenders to respect the mediation's confidentiality, because they cannot be forced to make a statement. However, the offender's right to speak may collide with the principle of confidentiality. Observing the confidentiality rule may restrict the freedom of offenders to respond to the criminal charge against them and conflict with an important rule that derives from the right to a fair trial.[193]

Victims can make a statement of their own accord, for example, a Victim Impact Statement (VIS). In a VIS, victims can explain the consequences that a crime has had for them. Here too, the principle of confidentiality may prove an obstacle, since respecting the confidential nature of the mediation can restrict the information the victim may want to include in the VIS.

Observing the confidentiality standard may also have ramifications in the context of civil law. If a victim-offender mediation is followed by civil litigation, it is likely that the victim and the offender will be parties to the civil proceedings. This implies that they in principle will bear the burden of proving their claims. The confidentiality rule, however, will restrict them in this respect, since they cannot furnish information from the mediation as evidence. In this way, the confidentiality rule can be at odds with a basic principle of civil law procedure. The legal obligation to give testimony may also cause friction when the parties call the mediator as a witness or appear as party witnesses themselves.[194]

3.7 Conclusion

Various standards have been developed and laid down in international protocols to enable a proper course and successful ending of victim-offender mediation. These standards guarantee the interests of the mediation participants and safeguard a fruitful progress of the process. To ensure the participation of the victim and the offender as well as a free exchange of information, one of the mediation standards requires that mediation operates in a confidential setting.

Victim-offender mediation is not a stand-alone procedure. This means that it can interact with other concepts, such as criminal and civil law principles, and may challenge the norms and values of these areas of law. The principle

193 Further, see Chapter Four.
194 Further, see Chapter Eight.

of confidentiality that governs victim-offender mediation can be incompatible with criminal and civil law tenets.

To assess whether these incongruities urge for a reaction, and what this reaction should be, the features of victim-offender mediation as well as those of criminal and civil law should be taken into account. The next chapter will therefore examine these issues.

PART TWO

RESEARCH FRAMEWORK

4 The Features of Victim-Offender Mediation, Criminal Law and Civil Law

4.1 Introduction

Victim-offender mediation cannot be considered a stand-alone procedure; it interacts with the law of criminal and civil procedure and primarily operates in the context of criminal law. It can take place before, during or after a criminal trial. Consequently, the contents and the outcome of a mediation can be relevant to subsequent criminal proceedings. These matters may also play a role in ensuing civil litigation.

Currently, no jurisdiction has replaced its criminal justice system by restorative practices; as a result, mediation in criminal matters has to be fitted within the existing judicial context. To avoid a conflict between the values of mediation and those of criminal and civil law, the main features of criminal and civil law should be taken into account *vis-à-vis* those of victim-offender mediation.

Tension may arise between basic standards of victim-offender mediation and tenets of criminal and civil law. For example, the fundamental criminal law principle that an accused has the right to remain silent can cause difficulties in a mediation setting; the communication in mediation would be gravely hampered if offenders could invoke this right during a mediation session. The underlying idea of mediation – offenders should accept and act on their responsibilities – does not mesh with ignoring the victim's questions or refusing to discuss their actual or alleged crime. Such a situation could easily lead to secondary victimisation. Conflicts between mediation fundamentals and those of criminal and civil law may also arise pertaining to the confidentiality principle. The advocated extent of mediation confidentiality implies that because mediation participants are not allowed to disclose mediation information afterwards, they are not free to make a statement regarding discussed topics in court. By contrast, it is an important feature of criminal and civil law to focus on the fact-finding process and clarifying relevant facts and circumstances. Consequently, people who are called in evidence generally have a legal duty to testify, and mediation participants can in principle be obliged to give testimony, even if this entails the disclosure of mediation information. These and other frictions concerning the confidentiality rule have been identified in Chapter 3.6, and will be discussed further in the following chapters.

The fundamentals of victim-offender mediation and those of criminal and civil law conflict, because the interests they represent appear to be irreconcilable. The rules of criminal and civil procedure aim to protect the procedural position of the subjects involved, while the goal of penal mediation is to enable a dialogue between the victim and the offender. To

resolve this conflict, it will be necessary to develop an approach that makes it possible to soundly and carefully balance the tenets of these vital concepts. To facilitate such an assessment, a research framework will be developed in this chapter, listing and examining the essential features of the systems involved. The relevant essentials of these three possible judicial reactions to crime will define the inner perimeter of the desired scope of mediation confidentiality. They will provide leads for the appraisal of the conflicting interests that are related to the tension caused by the private nature of victim-offender mediation.

This chapter will be devoted to the main features of victim-offender mediation, and of the law of criminal and civil procedure. Due to the focus of this research, the discussion of these features will be limited to those that are important in the light of the principle of confidentiality. These will mainly concern the way in which these systems deal with information, including restrictions on the admissibility of information in court.

4.2 Characteristics of Victim-Offender Mediation

The first concept that needs to be examined is victim-offender mediation itself. The relevant features of victim-offender mediation concern some of the standards that have been mentioned in the previous chapters and their main implications will therefore only be discussed briefly here.

The goal of victim-offender mediation is to offer the victim an opportunity to seek restoration;[195] it aims at compensating the material and immaterial harm suffered by the victim at the hands of the offender.[196]

For victim-offender mediation to be successful, it is essential that the victim and the offender agree on the basic facts of a case.[197] This requirement is considered a *conditio sine qua non* for the start of a mediation. Without mutual understanding about the relevant events, the victim and the offender will be unable to reach an agreement. Acknowledging basic facts also enables the offender to accept and act on his responsibilities. This is a necessary element of victim restoration, considering that it is impossible for an offender to provide compensation without acknowledging responsibility.

The basic-facts requirement is related to the principle of confidentiality in the sense that it contributes to a mutual understanding between the parties of the central issue of the mediation. Reciprocal recognition of the facts enables the victim and the offender to make a thought-out and conscious decision about their participation. This may have implications for the required level of confidentiality to be applied to the communication in

195 Among others, see H. Strang, *Repair or Revenge: Victims and Restorative Justice*, Oxford: Clarendon Press 2002, p. 44.

196 Among others, see M.S. Umbreit, R.B. Coates & B. Vos, 'Victim-Offender Mediation: Three Decades of Practice and Research', *Conflict Resolution Quarterly* 2004-1/2, p. 279.

197 Chapter 3.2.1.

mediation; the parties' recognition presupposes that they are aware of the central focus of the issue and that they will not act in a way that conflicts with this premise.

The basic-facts requirement thus functions as a significant means to achieve the aim of mediation, namely restoration for the victim. Other standards that safeguard a proper course of victim-offender mediation are the requirements of voluntary participation and voluntary agreement,[198] and the participants' right to information.[199] Both requirements also play a role in relation to the confidential character of victim-offender mediation.

The voluntary nature of the parties' participation entails that they have committed willingly to the mediation procedure. The same goes for their consent to the conditions that are included in the mediation agreement. This dual voluntariness may have consequences for the required level of confidentiality.

The right to information implies that the participants must be informed about various aspects of the mediation process. This includes information about the confidential nature of the process. The right to information thus ensures that the victim and the offender are aware of the implications of participating in mediation. Again, this aspect of their participation may affect the suitable level of confidentiality of the matters that are discussed in mediation.[200]

The other mediation standards are not directly linked to the principle of confidentiality and they will therefore not be discussed here. Nevertheless, they ought to be observed when searching for ways to deal with issues that are related to the confidentiality rule.

4.3 Characteristics of Criminal Law

4.3.1 Introduction: Fact-Finding and Right to a Fair Trial

The main object of criminal law is to respond adequately to a criminal act. The circumstances of the offence are investigated to determine who is liable under criminal law. If there is enough evidence to find the person accused guilty, he (or she) should be punished in a way that does justice to their person as well as to the nature of the crime.[201] To decide what is to be

198 Chapter 3.2.2.

199 Chapter 3.2.3.

200 The consequences of these mediation standards for the required level of confidentiality will be examined further in the following chapters.

201 Among others, see A.E. Taslitz, M.L. Paris & L.C. Herbert, *Constitutional Criminal Procedure*, New York: Foundation Press 2007, pp. 53-54; C. van den Wyngaert, *Strafrecht, strafprocesrecht & internationaal strafrecht*, Antwerp/Apeldoorn: Maklu 2006, pp. 425-427; B. Bouloc, G. Stefani & G. Levasseur, *Procédure pénale*, Paris: Dalloz 2008, p. 3; and M.S. Groenhuijsen & G. Knigge, 'Algemeen Deel', in: M.S. Groenhuijsen & G. Knigge (eds.),

regarded as the appropriate reaction, criminal law focuses on fact-finding, or, in other words, on investigating what actually happened.[202] Clarification of the actual course of events and relevant characteristics of the accused enable a proper response to the criminal violation of the law.

Considering that a proper reaction to a crime befits both the crime and the alleged offender, most jurisdictions take the circumstances of the case as well as the personal situation of the accused into account. However, the stage at which both aspects come into sight differs between countries. In most jurisdictions with a jury system, the personal circumstances of the offender are examined at the sentencing stage, after the jury has found the perpetrator guilty. As a result, criminal investigation in common-law countries is mainly focused on taking evidence. Available reports on the perpetrator's pre-delict and post-delict behaviour (such as the offender's explanation for the offence, any remorse shown, personal problems, medical history, etc.) are considered by the court after the accused has been found guilty and pertain to the sentence to be imposed.[203] In most civil-law systems, the investigation into the personal circumstances of the alleged offender is part of the preliminary investigation. These circumstances may influence the punishability of the accused as well as the determination of the appropriate punishment. The investigation into the personal characteristics of the defendant can include post-delict behaviour, such as his willingness to express remorse.[204] From this it follows that post-delict behaviour of the (alleged) offender can play a role in criminal law in a large number of jurisdictions, in both common-law and civil-law systems. This is important in the context of this research, since the offender's behaviour during victim-offender mediation also qualifies as post-delict behaviour.

The fact-finding process is crucial for criminal law to reach its goal; responding to crime and punishing the offender is impossible without clarifying the relevant facts and circumstances. Nevertheless, the fact-finding process has to respect certain boundaries. These limitations mainly consist of standards that safeguard the rights and interests of those who are being investigated and of other parties involved. The standards concerned can generally be categorised under the right to a fair trial laid down in

Het onderzoek ter zitting. Eerste interimrapport onderzoeksproject Strafvordering 2001, Deventer: Gouda Quint 2001, p. 16. See also C.H. Brants *et al*. (eds.), *Op zoek naar grondslagen. Strafvordering 2001 ter discussie*, The Hague: Boom Juridische uitgevers 2003, pp. 26-27.

202 Regarding this topic, see also J. Crijns & P. van der Meij, 'Over de grenzen van de materiële waarheidsvinding', in: R.H. Haveman & H.C. Wiersinga (eds.), *Langs de randen van het strafrecht*, Nijmegen: Wolf Legal Publishers 2005, pp. 45-69.

203 Among others, see S. Easton & C. Piper, *Sentencing and Punishment*, Oxford: Oxford University Press 2006, pp. 97-98, 209-210 and 214ff.; and S. Seabrooke & J. Sprack, *Criminal Evidence and Procedure: the Essential Framework*, London: Blackstone Press Limited 1999, pp. 373ff.

204 Among others, see G.J.M. Corstens, *Het Nederlands strafprocesrecht*, Deventer: Kluwer 2008, p. 33; and Van den Wyngaert 2006, pp. 237ff.

human rights treaties.[205] Art. 6 ECHR and Art. 14 ICCPR both state that any person facing a criminal charge is entitled to a fair and public hearing.[206] Art. 14 ICCPR is a more detailed provision on the fair-trial requirement, but the elements of the right to a fair trial that have not been incorporated in the ECHR have been recognised in the case law of the European Court of Human Rights. The notion of a fair trial, as it has been included in both treaties, thus generally offers similar rights to its addressees.[207]

The concept of a fair trial applies to any person facing a criminal charge.[208] The criminal charge applies to both the trial phase and the pre-trial phase, including the preliminary investigation.[209] Gathering relevant information and evidence during both phases therefore has to comply with the requirements that follow from Art. 6 ECHR and Art. 14 ICCPR.

The right to a fair trail is an umbrella concept[210] for many other rights and regulations concerning the (conduct of) a criminal trial. Some of these rights are explicitly mentioned in Art. 6 ECHR and Art. 14 ICCPR. Generally, these rights concern specifications of the notion of a fair trial;[211] the fairness of the hearing as such can still be challenged, even if the requirements of Art. 6

205 Other human rights may also influence the process of fact-finding, such as the right to privacy. This right has been incorporated in Art. 8 ECHR and Art. 17 ICCPR, and in Article 11 of the American Convention on Human Rights (ACHR).

206 The notion of a fair trial is also included in Art. 8 of the ACHR. The discussion of the fair trial requirement in this chapter can therefore – *mutatis mutandis* – also be considered to apply to the American Convention. On the ACHR and the notion of a fair trial, see, e.g., A.A.C. Trindade, 'The Right to a Fair Trial under the American Convention on Human Rights', in: A. Byrnes (ed.), *The Right to a Fair Trial in International and Comparative Perspective*, Hong Kong: Centre for Comparative and Public Law 1997, pp. 4-11.

207 Generally, the fair trial provisions in both treaties have a similar meaning and effect. As the notion of a fair trial has been dealt with in more detail by the ECtHR, the case law pertaining to Art. 6 ECHR has been chosen as the point of departure here. Specific features concerning the ICCPR and the ACHR will be referred to where appropriate. On the relation between the ECHR and the ICCPR, see M.G. Schmidt, 'The Complementarity of the Covenant and the European Convention on Human Rights – Recent Developments', in: D. Harris & S. Joseph (eds.), *The International Covenant on Civil and Political Rights and United Kingdom Law*, Oxford: Clarendon Press 1995, pp. 629-659, and pp. 632-633 (on the fair-trial principle).

208 The ACHR here mentions 'any accusation of a criminal nature' (Art. 8, para. 1 ACHR).

209 The moment a criminal charge is brought is generally marked by 'the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence' (ECtHR 27 February 1980, App. No. 6903/75, para. 46 (*Deweer v. Belgium*)). However, a formal notification is not always required; the opening of preliminary investigations can also imply a charge (ECtHR 10 December 1982, App. No. 8304/78, para. 34 (*Corigliano v. Italy*)). In addition, see P. van Dijk *et al*. (eds.), *Theory and Practice of the European Convention on Human Rights*, Antwerp/Oxford: Intersentia 2006, pp. 540-541; and F.G. Jacobs & R.C.A. White, *The European Convention on Human Rights*, Oxford: Clarendon Press 1996, pp. 134ff.

210 See also S. Greer, *The European Convention on Human Rights. Achievements, Problems and Prospects*, Cambridge: Cambridge University Press 2006, p. 251.

211 Among others, see Van Dijk *et al*. (eds.) 2006, pp. 579-580 and references there; p. 624 regarding the presumption of innocence included in Art. 6, para. 2 ECHR and Art. 14, para. 2 ICCPR; and p. 631 regarding minimum rights for the criminal suspect incorporated in Art. 6, para. 3 ECHR and Art. 14, para. 3 ICCPR.

ECHR and Art. 14 ICCPR have been complied with.[212]

Paragraph 2 of both fair trial articles mentions the presumption of innocence (see Section 4.3.4) as a right of the accused. Paragraph 3 concerns additional rights of the alleged offender. These rights constitute minimum standards pertaining to accused's possibilities to conduct their defence properly and fairly. They apply to their position in the actual proceedings and during the preliminary phase, since violations of the fair-trial concept prior to the court hearing of a case can also jeopardise the overall fairness of the proceedings. The rights that are incorporated in paragraph 3 of the two fair-trial provisions will not be discussed here separately, but will be referred to where appropriate.

To facilitate the fact-finding process, the criminal justice authorities have a large number of methods of investigation and quite a few coercive powers at their disposal. Most of these can be used against the will of the suspect. Because of the importance of the fact-finding process for the criminal justice system, there are few exceptions to these investigative methods.

The rights that follow from the notion of a fair trial safeguard a proper conduct of the prosecution and aim at protecting the parties involved, the suspect in particular. They lead the fact-finding process in the right direction, and determine the boundaries of the criminal investigation. The fair-trial concept, and its influence on the national fact-finding process therefore limit the options of domestic authorities to investigate the relevant facts and circumstances of a crime.[213] Such limitations are inspired by the need to avoid infringing various implications of the right to a fair trial and possibly also by the wish to prevent violation of other human rights, such as the right to privacy and private life.[214]

The boundaries of the fact-finding process set by the right to a fair trial imply that the use of relevant information in criminal procedures is limited by this concept.[215] The admissibility of any information in court, including that deriving from mediation, therefore depends on the limitations set by the fair-trial requirements. As far as is relevant to this research, the current section will therefore pay attention to the right to a fair trial. The rights that derive from the general notion of a fair trial will be discussed in the order of their appearance in the international treaties. The rights that have been developed in case law will be examined in Section 4.3.2. In addition, attention will be paid to how criminal law deals with the use and admissibility of information, by examining three general exceptions to the

212 Van Dijk *et al*. (eds.) 2006, pp. 632-633; and Greer 2006, p. 253.

213 See also Crijns & Van der Meij 2005, pp. 54-55.

214 Art. 8 ECHR, Art. 17 ICCPR, and Art. 11 ACHR.

215 Nevertheless, the ECtHR exercises restraint in this respect, and has ruled that it is not the role of the Court to judge the admissibility of evidence (ECtHR 12 July 1988, App. No. 10862/84 (*Schenk v. Switzerland*). See further Section 4.3.5.3.

use of information (Section 4.3.5).

4.3.2 Right to a Fair Trial

The right to a fair trial is expressed first and foremost in paragraph 1 of Art. 6 ECHR and Art. 14 ICCPR on a fair hearing.[216] The implications of this umbrella concept are specified further in both provisions, but are not restricted to the topics that are explicitly mentioned in the human rights treaties.[217]

The ECtHR has ruled that the main goal of the right to a fair hearing is 'to place the 'tribunal' under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant to its decision'.[218] To judge the fairness of proceedings, they will have to be considered as a whole.[219] The Human Rights Committee has stated that the fair trial concept 'should be interpreted as requiring a number of conditions, such as equality of arms, respect for the principle of adversary proceedings, preclusion of ex officio reformatio in pejus […] and expeditious procedure'.[220]

4.3.2.1 Right to Adversarial Proceedings

The right to a fair trial includes the accused's right to adversarial proceedings[221] or, as the adage goes, *audiatur et altera pars*. This right primarily entails that a defendant must have access to and be able to examine all the evidence that is filed in the course of criminal proceedings. Similarly, the prosecution is obliged to provide alleged offenders with all the available evidence against them, unless it is considered strictly necessary to withhold the evidence concerned.[222]

Art. 6, para. 3, under d ECHR and Art. 14, par. 3, under e ICCPR codify an aspect of the right to adversarial proceedings.[223] According to these

216 Art. 8, para. 1 ACHR does not mention a fair hearing as such, but it does stipulate that a hearing be provided 'with due guarantees'.

217 Van Dijk *et al*. (eds.) 2006, pp. 578-579 and references there. See also A. Sanders, 'A Fair Trial for the Suspect', in: A. Eser & C. Rabenstein (eds.), *Strafjustiz im Spannungsfeld von Effizienz und Fairness*, Berlin: Duncker & Humblot 2004, pp. 191-204.

218 ECtHR 19 April 1993, App. No. 13942/88, para. 30 (*Kraska v. Switzerland*).

219 See further S. Trechsel, *Human Rights in Criminal Proceedings*, Oxford: Oxford University Press 2005, pp. 86-89.

220 Human Rights Committee 28 July 1989, Com. No. 207/1986, para. 9.3 (*Morael v. France*). Footnote (asterisk) following 'ex officio reformation in pejus' omitted.

221 Among others, see Trechsel 2005, pp. 89ff.; Jacobs & White 1996, p. 125; S. Stavros, *The Guarantees for Accused Persons under Article 6 of the European Convention on Human Rights*, Dordrecht: Martinus Nijhoff Publishers 1993, p. 186.

222 For example, see the judgement of the ECtHR of 16 February 2000, App. No. 28901/95, para. 61 (*Rowe and Davis v. the United Kingdom*); and ECtHR 23 April 1997, App. Nos. 21363/93; 21364/93; 21427/93; and 22056/93, para. 58 (*Van Mechelen and others v. the Netherlands*). In addition, see Van Dijk *et al*. (eds.) 2006, pp. 587-588.

223 Bailey 1995, p. 228.

provisions, alleged offenders have the right to examine and cross-examine witnesses and to call witnesses on their behalf. This does, however, not mean that the accused has an unlimited right to hear witnesses; the decision whether or not to hear a particular witness is left to the discretion of the court.[224] The right to (cross-) examine and to call witnesses does not put forward any restrictions on the questions that the defence can pose to a witness. Nevertheless, in both common-law and civil-law systems, the court can decide not to allow certain questions.[225]

To protect the procedural fairness, the right to adversarial proceedings should also be observed if information from a mediation is used in a subsequent criminal trial.

4.3.2.2 Right to an Oral Hearing

The fair-trial concept also includes the right to an oral hearing.[226] This right is closely connected to the accused's right to be present at the trial and his right to defend himself in person.[227] These rights ensure that defendants can be present at the criminal proceedings concerning their case in person and that they can be heard during the trial. They are entitled to react to evidence that is produced against them and to adduce evidence to plead their case. The right to an oral hearing also applies to the hearing of a case on appeal, insofar as the appellate court has to examine the facts and law pertaining to a case, and makes an assessment of the question of guilt.[228] The applicability of an exception to the right to an oral hearing additionally depends on whether the accused was entitled to be present at the hearing at first instance.[229] Other aspects that have been taken into account by the ECtHR include the nature of the national appeal system, the scope of the powers of the appeal court, and the gravity of what is at stake for the accused.[230]

The right to an oral hearing and the right to defend oneself in person combine to give the alleged offender the right to make a statement in court. As follows from the above, the defendant's right to speak in appeal procedures is not absolute. In addition, the alleged offender does not have an 'unlimited right to use any defence arguments'.[231] The contents of the

224 For example, see the ECtHR *Doorson* case of the European Court (judgement of 26 March 1996, App. No. 20524/92, para. 82 (*Doorson v. the Netherlands*)); and, for a more recent example, the Court's judgement of 3 February 2004, App. No. 50230/99, para. 35 (*Laukanen and Maninnen v. Finland*).

225 Among others, see P. Murphy, *Murphy on evidence*, Oxford: Oxford University Press 2005, pp. 540ff.; and Van Dijk *et al*. (eds.) 2006, p. 648.

226 Stavros 1993, p. 189. See also Trechsel 2005, pp. 126ff., who considers the right to an oral hearing to be an extension of the right to a public hearing (Section 4.3.3).

227 Art. 6, para. 3, under c ECHR and Art. 14, para. 3, under d ICCPR.

228 For example, see the Court's judgement of 6 July 2004, App. No. 50545/99, para. 27 (*Dondarini v. San Marino*).

229 Van Dijk *et al*. (eds.) 2006, p. 589.

230 Van Dijk *et al*. (eds.) 2006, pp. 589-590 and references there.

231 ECtHR 28 August 1991, App. Nos. 11170/84; 12876/87; and 13468/87, para. 52 (*Brandstetter v. Austria*).

accused's statements can be limited by requirements of national law. It can therefore not be excluded that alleged offenders will be prosecuted if warranted by the contents of their statement, for example, because they raise false suspicions of punishable behaviour.[232] Nevertheless, in the *Brandstetter* case the ECtHR ruled that 'if it were established that, as a consequence of national law or practice in this respect being unduly severe, the risk of subsequent prosecution is such that the defendant is genuinely inhibited from freely exercising these rights', the contents of the defendant's statements might not lead to subsequent prosecution. This situation can occur when the accused is 'stopped […] or in any way restrained' from making a statement, for example, by being threatened with the possibility of prosecution if he exercises his right to speak.[233] In the case the accused's statement causes a disturbance of the hearing in court (such as contempt of court), the court can deal with this incident as it sees fit.[234]

As has been mentioned in Chapter Three, there may exist tension between the defendant's right to speak and the principle of confidentiality when the offender has participated in victim-offender mediation. The accused has the right to make a statement, whereas the confidentiality prohibits him from disclosing mediation-derived information.

4.3.2.3 Right against Self-Incrimination

The notion of a fair trial also includes the right against self-incrimination (or *nemo tenetur prodere se ipsum)*. Nobody can be forced to furnish evidence against him- or herself. The right against self-incrimination has been recognised in the case law of the ECtHR,[235] and has been incorporated in Art. 14, para. 3, under g of the ICCPR.[236] It applies to the pre-trial phase as well as to the actual proceedings. During the preliminary investigation, the right entails that no pressure may be exerted on the suspect to produce evidence. If the right is violated, the evidence obtained can be excluded.[237]

The main implication of the right against self-incrimination concerns the right to remain silent.[238] The accused cannot be forced or obliged to make a statement, thereby disclosing information that might subject them to

232 ECtHR 28 August 1991, App. Nos. 11170/84; 12876/87; and 13468/87, para. 50 (*Brandstetter v. Austria*). According to the Court, 'it would be overstraining the concept of the right of defence of those charged with a criminal offence if it were to be assumed that they could not be prosecuted when, in exercising that right, they intentionally arouse false suspicions of punishable behaviour concerning a witness or any other person involved in the criminal proceedings' (para. 52).

233 *Ibid*., para. 53.

234 On the accused's right of to express himself, see also Trechsel 2005, pp. 342-343.

235 For example, see the judgement of the ECtHR of 25 February 1993, App. No. 10828/84 (*Funke v. France*).

236 In this respect, see also Art. 8, para. 3 ACHR.

237 Further, see Section 4.3.5.3.

238 On the relation between the right against self-incrimination and the right to remain silent, see Trechsel 2005, p. 342; and P. Roberts & A. Zuckerman, *Criminal Evidence*, Oxford: Oxford University Press 2004, pp. 392ff.

criminal prosecution. In addition, defendants cannot be compelled to produce other types of evidence. The main exception to this rule is when the information concerned exists independently of the will of the suspect. According to the ECtHR, this category includes 'documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing'.[239]

The right against self-incrimination enables the accused to determine how they position themselves with regard to the criminal trial. Their ability to make or not to make a statement, or to provide evidence otherwise acknowledges their autonomous position in criminal proceedings. Nevertheless, the right to remain silent is not absolute.[240] The court may, under certain circumstances, draw adverse inferences from the defendant's decision to remain silent.[241] These circumstances are to be assessed in view of all aspects of a case, and can include 'the situations [covered by law – RvS] where inferences may be drawn, the weight attached to them by the national courts in their assessment of the evidence and the degree of compulsion inherent in the situation'.[242] However, the possibility to draw adverse conclusions from alleged offenders' silence must not cause them to be threatened with a criminal sanction merely because they refuse to make a statement or to provide evidence.[243]

The freedom of the accused to decide on his strategy for the hearing of their case is connected to the right to legal assistance,[244] and to the professional privilege of lawyers to refuse to testify.[245] These aspects allow offenders to make a well-informed decision about their position pertaining to the case against them.

To avoid a violation of the right against self-incrimination, a privilege to refuse to give testimony is also awarded if an intended witness[246] or a close

239 ECtHR 17 December 1996, App. No. 19187/91, para. 69 (*Saunders v. the United Kingdom*). However, obtaining information that exists independently of the accused's will can – under certain circumstances – cause a violation of the right against self-incrimination, for example, if the evidence concerned is obtained by significantly interfering with the defendant's mental and physical integrity, and through a high degree of compulsion. Other factors that the Court has taken into account include the weight of the public interest in the investigation and in the punishment of the offence concerned, the existence of any relevant safeguards in the procedure, and how the material concerned is used (ECtHR 11 July 2006, App. No. 54810/00, paras. 103ff. (*Jalloh v. Germany*)).

240 ECtHR 8 February 1996, App. No. 18731/91, para. 47 (*John Murray v. United Kingdom*).

241 See also Murphy 2005, pp. 318ff.; and Seabrooke & Sprack 1999, pp. 82ff.

242 ECtHR 8 February 1996, App. No. 18731/91, para. 47 (*John Murray v. United Kingdom*). The Court repeated its judgement in the *Condron* case of 2 May 2000, App. No. 35718/97, para. 56 (*Condron v. the United Kingdom*). See also paras. 44-58 of the *John Murray* judgement.

243 Van Dijk *et al*. (eds.) 2006, p. 593 and references there.

244 The right to legal assistance has been incorporated in Art. 6, para. 3, under c of the ECHR and Art. 14, para. 3, under d of the ICCPR.

245 On this topic, see further Section 4.3.5.2.

246 This does however not discharge him from taking the oath as a witness if domestic law requires him to do so. ECtHR 20 October 1997, App. No. 20225/92 (*Serves v. France*).

relative were to incriminate himself by giving testimony. Otherwise, the reliability of the statements concerned could be challenged, and close relationships might be endangered. The right to non-disclosure will be discussed further in Section 4.3.5.2.

When offenders have participated in victim-offender mediation and criminal proceedings ensue, the right to remain silent initially enables them to observe the principle of confidentiality, since they cannot be forced to make a statement about the mediation process.

4.3.3 Right to a Public Hearing

A significant element of the concept of a fair trial is the requirement that a hearing be public.[247] The public nature of criminal proceedings *vis-à-vis* the confidential nature of victim-offender mediation has been briefly discussed in Chapter Three. Public access to criminal proceedings is mainly inspired by the public interest in transparent, verifiable, and accurate information about the administration of justice.[248] The accused can waive his right to a public hearing, as long as he does so in an 'unequivocal manner' and the waiver does not 'counter [to] any important public interest'.[249] Such a waiver can be the voluntary and well-informed participation of the alleged offender in victim-offender mediation.

The main pertinence of the right to a public hearing in the context of this research is that the disclosure of information in court implies that this information is put in the public domain. This is a factor that has to be taken into account in the process of examining the suitable level of confidentiality in victim-offender mediation.

4.3.4 Presumption of Innocence

Art. 6, para. 2 ECHR and Art. 14, para. 2 ICCPR both state that '[e]veryone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law'.[250] This provision is generally referred to as the presumption of innocence (or *presumptio innocentiae*). It is an important aspect of the right to a fair trial, and an infringement of the presumption of innocence constitutes a violation of the fairness of the

247 Both Art. 6, para. 1 ECHR and Art. 14, para. 1 ICCPR mention 'a fair and *public* [italics added – RvS] hearing'. In addition, see Art. 8, para. 5 ACHR, which states that 'criminal proceedings shall be public'.

248 This ratio also follows from the judgement of the European Court of 8 December 1983, App. No. 7984/77 (*Pretto and others v. Italy*). See further Van Dijk *et al.* (eds.) 2006, p. 597, footnote 589 and references there; Jacobs & White 1996, p. 140; and Stavros 1993, p. 189.

249 ECtHR 21 February 1990, App. No. 11855/85, para. 66 (*Håkansson and Sturesson v. Sweden*). Further on this topic, see Van Dijk *et al.* (eds.) 2006, pp. 597-598 and cases quoted there. In addition, see also Greer 2006, pp. 254-255; Trechsel 2005, pp. 124-125; and Stavros 1996, pp. 190ff.

250 See also Art. 8, para. 2 ACHR.

proceedings concerned.

The presumption of innocence is a significant feature of criminal law. It expresses the basic idea that the prosecution sets out to prove the guilt of the accused on the basis of lawful evidence that is put forward during the trial. Consequently, defendants are not responsible for proving their innocence,[251] and the court must not be prejudiced against them prior to the proceedings.[252] The *presumptio innocentiae* also applies to the pre-trial phase, which implies that the suspect has to be regarded as innocent during the preliminary investigation.

The presumption of innocence is further linked to the right not to incriminate oneself and the right to remain silent.[253] The *presumptio innocentiae* is not to be violated if the offender exercises these rights. However, the court may draw adverse conclusions from alleged offenders invoking their right to remain silent;[254] the ECtHR then tends to consider the persuasiveness of the evidence under discussion.[255]

The presumption of innocence has inspired the adoption of the mediation standard that neither participation in mediation nor the acknowledgement of basic facts by the offender are to be used as evidence of admission of guilt in subsequent legal proceedings.[256]

4.3.5 Three Exceptions to the Use and Admissibility of Information in Court

The criminal justice process focuses on fact-finding, and the criminal justice authorities have many methods of investigation at their disposal. However, they cannot gather evidence unlimitedly, nor is all information admissible in court. Gathering proof during the preliminary investigation is restricted, as is the use of this information in court afterwards. Criminal law recognises three specific exceptions to the use and admissibility of information in court. These exceptions have been inspired by the protection of the notion of a fair trial and other human rights. The restrictions on the use of evidence show how the criminal justice system deals with the question of what information can or cannot be used in criminal proceedings, and why. Below, the use of coercive powers, the privilege to refuse to testify, and the exclusion of evidence, respectively, will be discussed.

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251 Jacobs & White 1996, p. 150.

252 Van Dijk *et al*. (eds.) 2006, pp. 625-626; and Bailey 1995, pp. 219-220.

253 Also Trechsel 2005, p. 166.

254 See further Section 4.3.2.3.

255 In the *John Murray* case of the European Court (8 February 1996, App. No. 18731/91, paras. 44-58 (*John Murray v. United Kingdom*)), the fact that 'adverse inferences' were drawn from the accused's silence was not considered a violation of the *presumptio innocentiae*. In the *Telfner* case, however, the Court ruled in the opposite direction (judgement of 20 March 2001, App. No. 33501/96, paras. 17-20 (*Telfner v. Austria*)).

256 Paragraph 14 of the Recommendation and Paragraph 8 of the Basic Principles. See also Chapter 3.2.1.

4.3.5.1 Coercive Powers

The methods of investigation that are available to the criminal justice authorities mainly concern coercive powers. They include surveillance, searches, telephone taps, and collecting body tissue and fluids for purposes of DNA-testing. The use of coercive powers facilitates the fact-finding process, tracing suspects, and gathering evidence. Criminal justice officials can obtain information without the cooperation or knowledge of the accused. As a result, the exercise of coercive powers may breach rights of the alleged offender or of other persons involved. For example, the right to privacy or private life, which follows from Art. 8 ECHR and Art. 17 ICCPR, is likely to be violated by the exertion of coercive powers.[257] Nevertheless, such a violation is permissible under certain circumstances.

Where appropriate, the provisions in the human rights treaties include escape clauses that indicate the circumstances under which the right can be legitimately infringed with. The main escape clauses stipulate that the intrusion should be in accordance with the law (ECHR and ICCPR) and in the interest of national security, public safety and economic well-being of a democratic society (ECHR). From this it follows that human rights can be infringed if the intrusion is regulated by law.[258] Considering that the exertion of coercive powers may cause a violation of human rights, its use has to be controlled by legislation. Consequently, gathering information that may be relevant to a trial is curbed by law – a legal restriction of the fact-finding process, which results from the assessment by national legislators of the admissibility of gathering certain information. As a result, gathering and using information that can be relevant in criminal court is limited.

4.3.5.2 Privilege to Refuse to Testify

Fact-finding generally also involves interrogating people who may be able to provide relevant information, and a wide range of individuals can be questioned. Most jurisdictions impose a legal duty on people who are called in evidence to make a statement.[259] People who have been summoned to give testimony have few options to refrain from doing so. The main ground to decline to appear as a witness is the privilege to refuse to testify. People who are entitled to a privilege cannot be obliged to make a statement when

257 In addition, see R. Stone, *The Law of Entry, Search and Seizure*, Oxford: Oxford University Press 2005, pp. 2, and 4ff. on the meaning of privacy under Art. 8 ECHR. The fair-trial requirements can be violated by wrongfully exercising coercive powers, which may constitute a violation of Art. 3 ECHR or Art. 7 ICCPR (see Stone 2005, pp. 243-244).

258 According to the ECtHR, the legislation concerned does not necessarily have to be of a formal nature, as long as the legislation in question is accessible and foreseeable. For example, see ECtHR judgement of 26 April 1979, App. No. 6538/74, para. 49 (*Sunday Times v. the United Kingdom*). This may, however, be different according to domestic law. For example, the codification of the right to private life in Article 10 of the Dutch Constitution (*Grondwet*) ensures that noncompliance has to be based on Acts of Parliament.

259 See further Chapter Eight.

they are called as witnesses. Such a privilege has been awarded to various categories of potential witnesses, and for various reasons, but in all cases, the fact-finding process is considered subordinate to the interest of secrecy. In this sense, the privilege to refuse to testify (hereafter referred to as privilege) is another exception to the use of information that may be relevant to a criminal trial.

A privilege can be awarded on relational or professional grounds. The first category concerns close relatives and (ex-) partners of the alleged offender. The degree of relationship covered by this category differs between countries and depends on domestic family law, but the underlying reasons are generally the same in all jurisdictions; the general purposes of the relational privilege are to safeguard the reliability of the evidence concerned and to observe the right to privacy and family life[260] by protecting the relationships of accused with their family members and/or (ex-) partners. However, the relational privilege does not entail that relatives of the accused are prohibited from making a statement. They have the right to refuse to give testimony, but they are under no obligation to either invoke or relinquish this right.[261]

A privilege is also awarded when giving testimony would incriminate a person the relational privilege applies to. The same goes for witnesses that would incriminate themselves by making a statement.[262]

The privilege can also be awarded on professional grounds. Proper professional performance is then considered to be dependent on the possibility of refusing to give testimony. The restrictions on the use of relevant information in court in this respect imply that people with a professional privilege are allowed to refrain from providing information because of a quality they have willingly accepted; they do not have a privilege because of their relationship with the offender, but because of the office they carry out.

Professionals with a professional privilege usually offer a service, such as medical, legal, or spiritual support. Furthermore, their tasks often include a pledge of secrecy pertaining to the relationship between them and their client: professionals do not reveal information they become privy to in the execution of their duties. However, not all service-oriented professions that involve a pledge of secrecy are assigned a privilege. The interests that are served by such a pledge do not in all cases prevail over the interest of

260 Art. 8 ECHR and Art. 17 ICCPR.

261 Further on the relational privilege, see Murphy 2005, pp. 485ff.; and Roberts & Zuckerman 2004, pp. 230-235.

262 Since no one can be obliged to incriminate himself, see Section 4.3.2.3. In addition, see, for example, Van den Wyngaert 2006, p. 927; Murphy 2005, pp. 435-445; and Roberts & Zuckerman 2004, pp. 228-230.

establishing the truth. A limited number of professions have been granted a privilege, because their well-functioning is considered so important that the interest of safeguarding proper professional performance outweighs the interest of fact-finding.[263]

Countries differ in determining which professions apply for a privilege. Some have opted to include an open norm in domestic legislation. In such cases, the decision to grant a privilege in a specific case is left to the discretion of the court.[264] Others have chosen to draw up an exhaustive list of professions that qualify for the privilege.[265] A combination is also found: national law explicitly mentions certain categories of professions, but includes an open norm as well.[266] Despite these differences, four categories of professions can be distinguished that are traditionally entitled to refuse to testify: doctors, lawyers, civil-law notaries, and clergymen.[267] These professionals provide a service that is considered so vital that their accessibility, approachability, and reliability warrants protection by a privilege. Doctors, lawyers, civil-law notaries, and clergymen are regarded as being unable to carry out their task if they cannot guarantee secrecy to those who have confided in them. The societal essentiality of their professions requires inviolable confidentiality.

The reasons for granting doctors a privilege concern the interest of protecting the privacy of individual patients and the interest of public health, which depends on the accessibility of medical health care. Awarding the privilege to lawyers facilitates and secures the right to legal assistance – which is part of the notion of a fair trial – enabling lawyers to properly assist and advise their individual clients in legal matters.[268] The services provided by civil-law notaries are indispensible in many situations, and will often involve topics that concern sensitive personal information. Their professional privilege precludes such information from being disclosed. Finally, the privilege secures the approachability of clergymen and their role

263 In addition, see on this topic C. Brants *et al*., *Verschoningsrecht in het strafrecht van Nederland en België*, Nijmegen: Wolf Legal Publishers 2006.

264 The Netherlands, France, Portugal and Spain (F.J. Fernhout, *Het verschoningsrecht van getuigen in civiele zaken*, Maastricht: Gianni 2004, p. 332). The United Kingdom also included an open norm in Article 12 of its Official Secrets Act 1992 (Stone 2005, pp. 118ff.). Further, see Murphy 2005, pp. 444ff.

265 For example, Denmark (e.g., clergymen, doctors, lawyers), Sweden (e.g., doctors, lawyers, clergymen), Finland (e.g., doctors, lawyers, clergymen), and Norway (e.g., clergymen, lawyers, doctors) (Fernhout 2004, p. 333).

266 Belgium (doctors are explicitly mentioned, while an open standard is also included), Germany (clergymen and doctors are explicitly mentioned), and Luxembourg (doctors and related professions are explicitly mentioned) (Fernhout 2004, p. 333). Pertaining to Belgium, see also Van den Wyngaert 2006, pp. 926ff.

267 C. Brants & T. Spronken, 'Het professionele verschoningsrecht: de arts, de advocaat en de journalist in de Nederlandse strafrechtpraktijk', in: Brants *et al*. 2006, p. 13; and Fernhout 2004, pp. 199-207. In addition, see Murphy 2005, pp. 445ff.

268 For example, see Murphy 2005, pp. 445-446. For a further explanation of the privilege to refuse to testify for lawyers in the United Kingdom, see pp. 445-452.

as counsellor or confessor. Their profession is partly protected by the right to freedom of religion.[269]

In addition to the four professions that are traditionally granted a privilege, other professions could also conceivably gain from the right to refuse to give testimony. However, in many cases, they have been denied a privilege, either because it was deemed unnecessary for practising the profession, or because the fact-finding process was considered to prevail. Uniform criteria for assessing whether a professional privilege has been rightfully awarded are hard to deduce, as categories of professions and reasons for denying the grant of a privilege vary widely. Being granted a privilege also depends on how national jurisdictions have incorporated the right to refuse to testify in legislation. Countries that have chosen to include an exhaustive list of professions that qualify for the privilege, tend to interpret the categories concerned extensively. For example, midwives and pharmacists are often classified in the category of doctors. When domestic legislation contains an open or a semi-open standard, awarding the privilege to 'new' professions is based on that standard. Due to these differences, it is hard to provide a detailed overview of all aspects that are relevant to granting an entitlement to refuse to give testimony. Nevertheless, some requirements that have been developed in case law are common to various jurisdictions. They will be briefly discussed below.

The first argument that can be deduced from case law concerns the pledge of secrecy. The sole existence of a pledge of secrecy does not automatically imply the entitlement to refuse to appear as a witness.[270] The interests that are protected by the promise to observe secrecy do not in all cases prevail over the interest of the fact-finding process.

Secondly, mandatory legal qualifications are a significant factor. The absence of such qualifications is an incentive not to grant the privilege to a certain group of professionals, because the homogeneity of this group cannot be guaranteed. An example of this can be found in the Netherlands, where the designation 'tax consultant' is not protected by law.[271] As a result, this group has not been awarded a privilege. A related factor is whether the group of professionals concerned is subject to sector-specific disciplinary law.

A third factor is the homogeneity of the professional's client group. Client heterogeneity has been mentioned as a motive for not awarding a privilege. Considering that a professional may serve an indefinable group of people

269 See Art. 9 ECHR and Art. 18 ICCPR.

270 For example, see Brants & Spronken 2006, pp. 8-12; P. Traest & J. Meese, 'Het verschoningsrecht naar Belgisch recht', in: Brants *et al*. 2006, pp. 117-118 (NB: in the Belgium context, the pledge of secrecy that is referred to here is the Belgian *discretieplicht*; Van den Wyngaert 2006, pp. 926-927); and Fernhout 2004, pp. 335ff.

271 Hoge Raad (HR) 6 May 1986, *Nederlandse Jurisprudentie* (*NJ*) 1986, 815.

and organisations, it cannot be assumed that the interest of secrecy prevails over that of fact-finding in all cases. This has been mentioned as one of the reasons why the chartered accountant has not been granted a privilege.[272]

A fourth point is whether it is legally or otherwise imperative for the public to procure the services of a professional. For example, a criminal suspect generally needs to be assisted by a lawyer, and a patient is dependent on a doctor for diagnosis and treatment. Nevertheless, not all professionals offer a service that is indispensable to the public. Granting the privilege to legal professionals (other than lawyers) is partly dependent on whether people have a legal duty to seek the assistance of a professional; then, the right to refuse to testify plays a role in securing the access to legal aid. For that reason, tax counsellors are among those who have not been awarded the privilege,[273] since their clients request their assistance primarily of their own volition. If clients do not want information exchanged between them and the professional to be disclosed in court, they will have to reconsider approaching the professional. Nevertheless, professionals may still have to observe confidentiality outside court, due to their professional pledge of secrecy.

A fifth element is that certain professions perform a number of different tasks. Some of these tasks may require a privilege, while others do not. However, separating the different components of a profession's area of work often seems artificial and may be hard in practice. Consequently, professionals that fall into this category are usually not granted a privilege. It is one of the reasons why social workers have thus far not been awarded a privilege.[274] A significant part of their job consists of collecting information for reports or the authorities. Awarding them a privilege would be inexpedient, since the information concerned is gathered with a view to notifying others. However, social workers may also offer mental support and assistance. If this aspect of their job could be visibly and practically separated from their other duties, a privilege could be granted for this component of their work. The same goes for victim support volunteers, who may also discuss personal and sensitive information with their clients in a professional capacity.[275] Probation officers, however, are awarded the privilege as far as offering mental support and assistance is concerned.[276]

The position of journalists pertaining to the professional privilege is special. They do not provide medical, legal, spiritual, or notarial assistance to their clients, and their profession is subject neither to the fulfilment of mandatory

272 See for Dutch decisions on this matter HR 25 October 1983, *NJ* 1984, 132; and, more recently, HR 4 January 2000, *NJ* 2000, 537.
273 Fernhout 2004, pp. 227-228.
274 Although social workers are sometimes excused from testifying in individual cases (Fernhout 2004, p. 233).
275 Fernhout 2004, p. 227.
276 Fernhout 2004, p. 874. See also HR 20 June 1968, *NJ* 1968, 332.

legal requirements, nor to sector-related disciplinary law. Nevertheless, their right to protect their sources, and therefore to keep information secret, has been confirmed numerous times in case law. The freedom of the press and the right to free access to information,[277] entitle them to refuse to reveal their sources, despite the fact that the journalist profession does not comply with the above-mentioned criteria for being granted a privilege. In 1996, the ECtHR ruled that this right implies that journalists can only be forced to divulge their sources if the escape clauses apply, namely if disclosure is 'necessary in a democratic society' due to 'an overriding requirement in the public interest'.[278] In other situations, journalists cannot be compelled to reveal their sources.[279]

Opinions differ on whether mediators ought to be given a privilege. In view of the confidential nature of victim-offender mediation, they would understandably benefit from a privilege, and some jurisdictions have therefore regulated the competences of the mediator.[280] Awarding the privilege to mediators will be discussed further in Chapter Eight.

A professional privilege to refuse to testify is not absolute – it may not apply in certain situations. In the first place, the privileged professional can decide to make a statement despite an applicable legal privilege. Secondly, the privilege can be restricted for other reasons.

The decision whether to give testimony in spite of an applicable entitlement to refuse to testify is initially left to the privileged professionals, even when a client agrees to disclosure.[281] Professionals have to weigh the

277 Art. 10 ECHR and Art. 19 ICCPR.

278 Judgement of 27 March 2002, App. No. 17488/90, para. 39 (*Goodwin v. the United Kingdom*). For recent implications of this judgement, see the judgements of the European Court of 22 November 2007, App. No. 64752/01 (*Voskuil v. the Netherlands*), 25 April 2006, App. No. 69698/01 (*Stoll v. Switzerland*); and 24 November 2005, App. No. 53886/00 (*Tourancheau and July v. France*).

279 The Netherlands has not laid down the journalist's right to protect his sources and material in legislation, but has nevertheless complied with the decision of the European Court in its case law. See for recent cases HR 23 January 2007, *NJ* 2007, 94; HR 17 October 2006, *NJ* 2007, 25; and HR 5 December 2006, *NJ* 2006, 665. Countries that do have legal provisions on this topic, include Denmark, Finland, and Norway. See for the situation in the United Kingdom, Murphy 2005, pp. 461ff.

280 For some examples, see Chapter 3.5.2.

281 Although legislation in some jurisdictions states that the privilege is no longer effective in such cases. This is true in, e.g., Denmark, Germany, Finland, and Austria (Fernhout 2004, p. 299; and Y.G.M. Baaijens & J.B.H.M. Simmelink, 'Normering van de opsporing', in: M.S. Groenhuijsen & G. Knigge (eds.), *Dwangmiddelen en rechtsmiddelen. Derde interimrapport onderzoeksproject Strafvordering 2001*, Deventer: Kluwer 2002, p. 574). In the United Kingdom, the accused is considered the person to whom the privilege has been awarded. Consequently, certain communications between the alleged offender and his lawyer cannot be disclosed. In such instances, the decision to reveal certain information is left to the discretion of the accused, since the privilege is granted to him, not to the professional (Baaijens & Simmelink 2002, pp. 578-579). However, in France and Italy, the professional privilege remains intact, even when the client has agreed to disclosure (Fernhout 2004, p. 338).

consequences of disclosure against those of maintaining secrecy. In this appraisal, they should not only take the interests of their individual clients into consideration, but also their own, and those of their professional group. Consequently, a professional may, for example, decide not to exercise his privilege so as to prevent serious harm or injustice, such as life-threatening situations or the conviction of an innocent person.

A legal privilege may also be restricted by a professional's legal duty to report certain issues. Such a duty can either be a professional one (for example, a doctor may have certain reporting duties related to the protection of national health), or apply to any civilian (for example, a reporting duty pertaining to the protection of public safety).

4.3.5.3 Exclusionary Rule

The criminal justice authorities have many sources at their disposal – such as coercive powers and oral testimony – to facilitate the fact-finding process. The use of these investigation methods is regulated in the human rights treaties[282] and in domestic legislation to protect the quality of the information obtained and the rights of the accused. A violation of these rules may endanger the right to a fair trial[283] and can therefore carry the following sanctions: dismissal of a case, exclusion of evidence, or mitigation of the sentence to be imposed. These sanctions can be found in many jurisdictions, although their use may vary due to systemic legal differences.

This section discusses possible exceptions to the use of information in criminal law, and reduced sentences and dismissed cases are therefore irrelevant. The exclusion of evidence is important here, since it prohibits the use of unlawfully obtained information as evidence in court. If breaching the confidentiality rule would lead to this designation, mediation information would consequently be inadmissible in court, and this would understandably have a negative effect on the effectiveness of making exceptions to the principle of confidentiality.[284]

The exclusionary rule implies that unlawfully obtained evidence has to be excluded from the court's assessment of a case. It mainly concerns information that has been gathered during the preliminary investigation; irregularities in the collection of evidence in the course of the hearing can be repaired during the hearing, or can cause the judgement to be reversed by a court of higher jurisdiction.

282 Regarding the infringement of human rights, see Stone 2005, pp. 60ff.

283 Among others, see Murphy 2005, pp. 52-53; and Y.G.M. Baaijens, 'De rechtsgevolgen (sanctionering) van onrechtmatigheden in het opsporingsonderzoek', in: M.S. Groenhuijsen & G. Knigge (eds.), *Afronding en verantwoording. Eindrapport onderzoeksproject Strafvordering 2001*, Deventer: Kluwer 2004, p. 345.

284 The confidentiality rule initially prevents the mediation procedure from being used as an illegitimate method of taking evidence, since the information concerned is subject to secrecy.

The exclusion of unlawfully obtained evidence aims at repairing the violated rules. Furthermore, it shows that the government has to observe its own rules and that an infringement will have consequences. In addition, penalising the criminal justice authorities for wrongful actions may make them more aware of the importance of their compliance with the law.

The main shortcoming of the exclusionary rule is that it cannot fully prevent the court from being influenced by the evidence concerned. The exclusion decision is usually made by the court hearing the case,[285] which will inevitably take note of the contested evidence. As a result, it cannot be ruled out that the court's decision is affected by this evidence, despite the fact that, once dismissed, it has to be disregarded.[286] The exclusionary rule can also have a limiting effect on the fact-finding process. Furthermore, if an accused is acquitted because of inadmissible evidence, there may be public incomprehension about and social dissatisfaction with the administration of justice.[287]

Leaving the application of the exclusionary rule to the discretion of national courts corresponds with ECtHR case law. In the *Schenk* case, the Court ruled that it is not the role of the Court to judge the admissibility of evidence.[288] However, the Court may give a ruling on the appropriate consequences of an unlawful obtainment of evidence. The *Khan* judgement implies that the manner in which evidence has been obtained must not infringe the accused's right to a fair trial.[289] In line with this judgement, the Court tends to react to unlawful obtainment of evidence if such unlawfulness undermines the fairness of the proceedings as a whole.[290]

285 This is the case in the Netherlands (Article 359a of the Dutch Code of Criminal Procedure (*Wetboek van Strafvordering*, WvSv), and Baaijens 2004, p. 345), Germany (Baaijens 2004, p. 373; and M.C.D. Embregts, *Uitsluitsel over bewijsuitsluiting: een onderzoek naar de toelaatbaarheid van onrechtmatig verkregen bewijs in het strafrecht, het civiele recht en het bestuursrecht*, Deventer: Kluwer 2003, pp. 35-38), the United States (Baaijens 2004, pp. 365-366; and also Taslitz, Paris & Herbert 2007, p. 550), and the United Kingdom (Stone 2005, p. 60; Baaijens 2004, p. 375; and Seabrooke & Sprack 1999, p. 154).

286 Belgium circumvents this issue, since the exclusion assessment can be made by the criminal division hearing the case, but also by the court's indictment division. This division is a separate department of the court that supervises the observance of the rules of conduct for criminal investigations and the gathering of evidence (Van den Wyngaert 2006, p. 587; and Baaijens 2004, p. 366).

287 For the ratio and disadvantages of the exclusionary rule, see, among others, Taslitz, Paris & Herbert 2007, pp. 613ff.; Van den Wyngaert 2006, pp. 1105-1106; Roberts & Zuckerman 2004, pp. 150ff.; Baaijens 2004, pp. 354-357; and Embregts 2003, pp. 104-107 and 109-111.

288 ECtHR 12 July 1988, App. No. 10862/84 (*Schenk v. Switzerland*). For a more recent example, see the judgement of 5 November 2002, App. No. 48539/99 (*Allan v. United Kingdom*). In addition, see Stone 2005, p. 60; and Seabrook & Sprack 1999, pp. 154-155.

289 ECtHR 12 May 2000, App. No. 35394/97, para. 35 (*Khan v. the United Kingdom*).

290 For example, see ECtHR 9 June 1998, App. No. 25829/94 (*Teixeira de Castro v. Portugal*); ECtHR 5 November 2002, App. No. 48539/99 (*Allan v. United Kingdom*); and Stavros 1996, pp. 225ff. On the (same) opinion of the Human Rights Committee, see Bailey 1995, pp. 231-232.

The overall procedural unfairness of the procedure as a ground for the exclusion of evidence is the main guidance offered by the ECtHR in this respect.[291] Additionally, the notion of a fair trial has inspired domestic legislation on the exclusionary rule. However, because of the casuistic nature of domestic rulings on the admissibility of unlawfully obtained evidence, few general requirements can be distinguished. The aspects that can be deduced from national practice will be discussed below. They are important here, since they point to incentives not to disclose certain information in court.

Four elements are common to various jurisdictions. The first concerns the question whether the violated right or norm aims at protecting the accused (the *Schutznorm* theory). If not, the defendant is not directly disadvantaged by the infringement of the rule concerned. In such cases, national courts tend not to apply the exclusionary rule. The *Schutznorm* theory can, for example, be found in the Netherlands (*relativiteitstheorie*)[292] and the United States ('standing'); one of the requirements of the application of the American exclusionary rule is that the violated norm must be directed at the suspect.[293] More or less the same regimen is followed in Germany (*Rechtskreise* theory).[294]

The second factor is the causal link between the unlawfulness of the investigative activities and the resulting evidence. In other words, if the availability of certain evidence is not directly related to the unlawful methods that were used to obtain it, this can be a reason not to exclude the evidence. The causality between the illegality of obtainment and the evidence obtained is a factor common to practice in the United States,[295] Belgium,[296] and the Netherlands.[297]

The third element concerns the reliability of the challenged evidence as well as the available verification options.[298] If the unlawfulness impairs the reliability of the evidence, this can be a reason for exclusion. This aspect plays a role in Belgium (the unlawfulness must not affect the reliability of the evidence),[299] the United States,[300] and the United Kingdom (unlawfulness and unreliability of the evidence are considered to threaten

291 However, the violation of other rights, (such as Art. 3 ECHR (Freedom of Torture and Other Inhuman or Degrading Treatment)) may also be taken into account (ECtHR 11 July 2007, App. No. 54810/00 (*Jalloh v. Germany*)).
292 Baaijens 2004, p. 348; and Embregts 2003, pp. 124ff.
293 Baaijens 2004, p. 365; and Embregts 2003, pp. 124ff.
294 Baaijens 2004, p. 373; and Embregts 2003, pp. 129-131.
295 Taslitz, Paris & Herbert 2007, pp. 564ff.
296 Van den Wyngaert 2006, p. 1114.
297 See also Embregts 2003, pp. 132ff.
298 Unreliable evidence may also simply be ignored by the court, regardless of how it was obtained.
299 Belgium Court of Cassation (*Hof van Cassatie*), no. P.03.0762.N/1. On the functioning of the Belgian exclusionary rule, see also Van den Wyngaert 2006, pp. 1119 and 1121.
300 Taslitz, Paris & Herbert 2007, pp. 576ff.

the fairness of the procedure).[301]

The fourth element concerns the question whether the unlawfulness is caused by an excusable error of the criminal justice authorities. If so, this is an incentive not to exclude the contested evidence. This factor is common to the Netherlands,[302] the United Kingdom ('good faith'),[303] and the United States ('good faith exception').[304]

4.4 Characteristics of Civil Law

4.4.1 Introduction: Active Parties and Right to a Fair Hearing

The main object of civil law is to establish the rights and obligations of parties in civil lawsuits (based on the submitted claims and counterclaims) by examining the arguments and information presented. The initiative to take a matter to court is left to the parties. They have an active role during the proceedings and are responsible for determining the object of litigation. They must also additionally produce the evidence that is necessary to substantiate their claims. Litigation is started by the plaintiff, who submits his or her legal claim to the court. The plaintiff's opponent may subsequently state additional facts and thus extend the focus of the proceedings. The information that is put forward by the parties constitutes the extent of the proceedings. Within this framework, the parties are obliged to disclose the necessary information completely and truthfully.

The parties to a civil action are initially considered equal. They both have similar opportunities to argue their case and they can exercise similar rights. From this it follows that the parties can generally decide to end a procedure by mutual consent. Furthermore, it implies that the court refrain from ruling on matters that do not concern submitted claim(s) and that it not extend the original claim(s) by adding facts or circumstances. In addition, the court must accept facts that are not challenged by the parties. In other words, the court has little influence on the substantive focus and extent of the proceedings; its main role concerns the course of the proceedings.

The court charges the parties with the burden of proof based on their claims. Generally, the claiming party has to produce the corresponding evidence. If no proper offer to furnish proof is made, the court can order a party to advance evidence. Furthermore, in some cases the court is entitled to investigate the case brought before it of its own accord. These investigation methods can include an on-the-spot inspection and a request

301 Baaijens 2004, p. 375 and references there.
302 HR 30 March 2004, *NJ* 2004, 376; and HR 19 June 2001, *NJ* 2001, 574.
303 Seabrooke & Sprack 1999, pp. 143ff.
304 Regarding the United States, see Taslitz, Paris & Herbert 2007, pp. 576ff.; and Embregts 2003, pp. 149ff.

for an expert opinion. Other evidence that is used in civil proceedings consists largely of documents and testimonies. Testimonial evidence can be offered by witnesses that have been summoned by the parties, but can also include statements that are made by the parties themselves.[305]

To protect the rights and the interests of the parties involved, lawsuits and the evidence collection process must meet certain procedural standards that follow from the fair-hearing concept codified in Art. 6 ECHR and Art. 14 ICCPR. These provisions regulate the investigation into the facts and circumstances of a case. Art. 6 ECHR applies to anyone who is subject to 'the determination of his civil rights and obligations'.[306] Art. 14 ICCPR speaks of 'the determination […] of his rights and obligations in a suit at law'.[307] The applicability of the fair-hearing requirement thus requires a 'determination'; there must be a connection between the dispute to be resolved and a civil right or obligation.[308]

To answer the question whether civil rights and obligations are involved, the object and purpose of both the ECHR and law of the state concerned must be taken into account.[309] According to the ECtHR, the term 'right' applies if the claim can be said, at least 'on arguable grounds', to be recognised under domestic law.[310] Consequently, a civil right may well be considered to exist even if the Court is not convinced that this right is well-founded under domestic law.[311] However, this is different if a domestic court has ruled that a right does not exist under national law; in such cases, the ECtHR cannot overrule this decision by considering Art. 6 ECHR applicable.[312] The issue of the applicability of the term 'obligation' has so far not caused problems that needed to be dealt by the Court.[313]

For Art. 6 ECHR and Art. 14 ICCPR to be applicable, the right or obligation concerned needs to be of a civil nature. The main determent is

305 Currently, most Western countries allow parties to give testimony. For example, see C.H. van Rhee (ed.), *European Traditions in Civil Procedure*, Antwerp/Oxford: Intersentia 2005, p. 189. For a further explanation of the position of party witnesses, see Chapter Eight.

306 Art. 6, para. 1 ECHR.

307 Art. 14, para. 1 ICCPR. In the ACHR, the right to a fair trial is laid down in Article 8: 'the determination of his [every person's – RvS] rights and obligations of a civil […] nature'.

308 On the term 'determination', see in more detail Van Dijk *et al*. (eds.) 2006, pp. 521-524 and references there.

309 ECtHR 28 June 1978, App. No. 6232/73, paras. 88-89 (*König v. Germany*). In addition, see Jacobs & White 1996, pp. 128ff.

310 For example, see ECtHR 21 February 1986, App. No. 8793/79, para. 81 (*James and others v. the United Kingdom*); and, more recently, the judgement of 10 May 2001, App. No. 29392/95, para. 87 (*Z. and others v. the United Kingdom*).

311 Van Dijk *et al*. (eds.) 2006, p. 517 and references there.

312 ECtHR 10 May 2001, App. No. 29392/95 (*Z. and others v. the United Kingdom*); and ECtHR 28 June 2001, App. No. 45424/99, para. 27 (*Truhli v. Croatia*). On the relationship between national recognition of a 'right' and the view of the European Court, see Van Dijk *et al*. (eds.) 2006, pp. 518-519 and references there.

313 Van Dijk *et al*. (eds.) 2006, p. 519.

'the substantive content and effects' of the right, rather than its legal classification.[314] As a result, domestic civil law rights,[315] public law rights, and rights that concern a conflict between a public authority and an individual can be qualified as such.[316] The phrase 'civil rights an obligations' can thus be considered to apply to a large variety of proceedings.[317]

As the fair-hearing requirement applies to civil law, various rights that follow from it also apply in civil cases. Examples include the right to adversarial proceedings and the right to an oral hearing. A violation of these rights implies an infringement of the fairness of the proceedings concerned. In addition, the fairness of a civil action may also be violated if a criminal law requirement is infringed, for example, the right to legal aid.[318] However, since rights such as this one have not been included in the human rights treaties regarding civil law, the ECtHR has ruled that national authorities have greater latitude in this respect when dealing with civil cases.[319]

The rights that follow from the right to a fair hearing govern the taking of evidence and the subsequent furnishing of this evidence in court. They regulate the use of information that may be relevant to the parties in civil proceedings, including mediation information. As far as relevant to this research, the fair hearing principle will be discussed below. The various requirements will again be discussed in order of appearance in the human rights treaties. The standards that have been developed in case law will be dealt with in the section on the right to a fair hearing (Section 4.4.2). Additionally, three exceptions to the use of information in civil law will be examined, since the reasons for their applicability may be relevant to the admissibility of information from a mediation.

4.4.2 Right to a Fair Hearing

The meaning of the notion of a fair hearing, as it has been discussed in Section 4.3.2 pertaining to criminal law, also applies here. The fairness of a civil action again depends on how the proceedings as a whole have been conducted. The applicable written standards are included in Art. 6, para. 1

314 ECtHR 28 June 1978, App. No. 6232/73, para. 89 (*König v. Germany*).
315 ECtHR 28 November 1984, App. No. 8777/79, para. 32 (*Rasmussen v. Denmark*).
316 Van Dijk *et al*. (eds.) 2006, pp. 524-525.
317 For an extensive list and corresponding case law, see Van Dijk *et al*. (eds.) 2006, p. 528. For the discussion about procedures that cannot be categorised under the fair-trial concept, see Van Dijk *et al*. (eds.) 2006, pp. 528-535.
318 For example, see the ECtHR judgement of 9 October 1979, App. No. 6289/73, paras. 24-26 (*Airey v. Ireland*), regarding the right to legal aid in civil proceedings.
319 ECtHR 27 October 1993, App. No. 14448/88, paras. 32-33 (*Dombo Beheer B.V. v. the Netherlands*); ECtHR 9 March 2004, App. No. 30508/96, para. 59 (*Pitkänen v. Finland*); and Van Dijk *et al*. (eds.) 2006, pp. 579 and 631.

ECHR and Art. 14, para. 1 ICCPR.[320] Furthermore, an infringement of one of the rights concerning criminal law may, under certain circumstances, also constitute a violation of the fair-hearing requirement in civil context.[321] In addition, the fair-hearing requirements that have been developed in case law also apply to civil proceedings. The unwritten standards that are relevant to this research will be discussed below.

4.4.2.1 Right to Adversarial Proceedings

In civil law, the right to adversarial proceedings applies at two levels. In the first place, each party has the right to be acknowledged by the court and to present its case. This implies that the parties have equal opportunities to furnish evidence. Secondly, parties must be allowed to react to each other's assertions and claims, including oppositional evidence.[322]

The adversarial principle is an important element of civil law. It safeguards the active role of the parties during civil proceedings, and creates the parameters of debate on equal footing. The autonomous position[323] of the parties in a civil lawsuit also allows them to renounce their right to advance evidence. Such a waiver can, for example, be the free and voluntary consent of the litigating parties to participate in victim-offender mediation. This would prevent a party from challenging the fairness of a civil action – mediation confidentiality confines the freedom to furnish evidence.[324]

Art. 6, para. 3, under d ECHR and Art. 14, para. 3, under e ICCPR state that accused have the right to examine and cross-examine witnesses and to call witnesses on their behalf.[325] Under certain circumstances, this standard also applies to civil law.[326] In principle, parties in civil lawsuits have similar opportunities to summon witnesses and to request an expert opinion.[327] Consequently, these issues may also play a role in assessing the fairness of a civil action.[328] According to the ECtHR, the parties in litigation must have an

320 And in Art. 8, para. 1 ACHR.

321 Further, see Section 4.4.1 and references there.

322 In addition, see the ECtHR judgement of 27 October 1993, App. No. 14448/88, para. 33 (*Dombo Beheer B.V. v. the Netherlands*). This aspect of the right to adversarial proceedings is also referred to as the right to 'equality of arms' (Van Dijk *et al*. (eds.) 2006, p. 580; and Jacobs & White 1996, pp. 124-125). Further, see the ECtHR judgements of 22 September 1994, App. No. 13616/88, para. 56 (*Hentrich v. France*); and 9 December 1994, App. No. 13427/87, para. 46 (*Stran Greek Refineries and Stratis Andreadis v. Greece*).

323 On the autonomy of civil parties, see also W.D.H. Asser *et al*., *Een nieuwe balans*, The Hague: Boom Juridische uitgevers 2003, pp. 65ff.; and W.D.H. Asser *et al*., *Uitgebalanceerd*, The Hague: Boom Juridische uitgevers 2006, pp. 49-51.

324 Regarding the waiving of a right, see also Section 4.3.3.

325 See Art. 8, para. 2, under 6 ACHR.

326 See also Section 4.4.1.

327 For example, see the ECtHR's judgement of 27 October 1993, App. No. 14448/88, paras. 33-35 (*Dombo Beheer B.V. v. the Netherlands*). The *Ankerl* case (judgement of 23 October 1996, App. No. 17748/91, para. 38 (*Ankerl v. Switzerland*)) dealt with inequality as the result of a witness having been granted a relational privilege (on this topic in a civil context, see Section 4.4.4.1).

328 ECtHR 9 March 2004, App. No. 30508/96, paras. 59-65 (*Pitkänen v. Finland*).

effective or real opportunity to react to the evidence that is furnished in the course of the proceedings.[329]

In conclusion, the right to adversarial proceedings must be observed when information from a mediation is used in court and may, as a result, influence the admissibility of that information. For that reason, the litigating parties must be able to respond to the submitted evidence, also if mediation information is concerned.

4.4.2.2 Right to an Oral Hearing

The parties in litigation have the right to an oral hearing. Although civil proceedings are in many jurisdictions mainly conducted in writing, this right implies that the parties are entitled to be present at the actual hearing of their case and to be heard.[330] In the *Helmers* case, the ECtHR has ruled that the seriousness of what is at stake for the applicant must be taken into account when assessing an alleged violation of this right.[331]

During the hearing of a case, the parties in civil proceedings must be allowed to argue their case. In addition, most jurisdictions allow the possibility for parties to appear as witnesses,[332] so they can provide the information they feel is necessary to substantiate their claims.[333] If information from a mediation is open to disclosure, the parties can, for example, furnish such information when appearing as party witnesses.

4.4.3 Right to a Public Hearing

Art. 6 ECHR and Art. 14 ICCPR both state that – in addition to being fair – a hearing has to be public. The proceedings themselves and the pronouncement of the judgement must be publicly accessible. Escape clauses provide for exceptions to this rule. Furthermore, the parties in litigation can waive their right to a public hearing,[334] for instance, through the voluntary and informed nature of the parties' participation in victim-offender mediation.

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329 Judgement of 9 March 2004, App. No. 21497/93, paras. 35-36 (*Mantovanelli v. France*).

330 On the right to an oral hearing, see also the ECtHR judgement of 25 November 1997, App. No. 18928/91, paras. 21-22 (*Fredin v. Sweden, no. 2*). In this case, the Court linked the right to an oral hearing to the right to a public hearing. In addition, see ECtHR 26 April 1995, App. No. 16922/90, para. 44 (*Fischer v. Austria*). In this judgement, the Court posed the question whether the beneficiary of the right to a public hearing had explicitly waived his right. The importance of the proceedings for the beneficiary was mentioned as a factor to be taken into account in assessing the violation of the right to an oral hearing.

331 ECtHR 29 October 1991, App. No. 11826/85, paras. 36-39 (*Helmers v. Sweden*). See also, for example, ECtHR App. No. 18928/91, para. 22 (*Fredin v. Sweden, no. 2*); and ECtHR 12 July 2001, App. No. 33071/96, para. 60 (*Malhous v. the Czech Republic*).

332 The position of the party witness will be discussed in Section 4.4.4.2 and Chapter Eight.

333 In addition, see Jacobs & White 1996, p. 126.

334 ECtHR 21 February 1990, App. No. 11855/85, para. 66 (*Håkansson and Sturesson v. Sweden*).

The right to a public hearing in civil cases is also inspired by the required transparency, verifiability and accuracy of information about the administration of justice. Transparency and publicity will understandably contribute to the observance of the law. Naturally, the parties involved in civil litigation must be protected against arbitrariness, and their claims must be assessed properly. Nevertheless, in many jurisdictions, civil proceedings are mainly conducted in writing. For obvious reasons, public access to such proceedings does not apply. In addition, in civil litigation the parties themselves are primarily responsible for submitting their claims and furnishing the necessary evidence. They are not subjected to the discretion of the state personified by the public prosecutor, as they would be in criminal proceedings. As a result, the transparency and verifiability of the administration of justice are of minor importance in this context.

Nevertheless, information that is disclosed during a civil hearing is public. This must be taken into account when assessing the admissibility of information from a victim-offender mediation.

4.4.4 Three Exceptions to the Use and Admissibility of Information in Court

The determination of the subject matter of civil proceedings is primarily left to the litigating parties. They are responsible for submitting claims and for furnishing evidence. They have many information sources at their disposal, but the use of information as evidence can be restricted in order to avoid a violation of the right to a fair hearing or other rights that have been incorporated in the human rights treaties. In the civil law context, three exceptions can be distinguished. They show how civil law deals with the admissibility and exclusion of information and what the reasons for this approach are. The three exceptions are the privilege to refuse to testify, the limited conclusive force of party-witnesses' statements, and the exclusionary rule.

4.4.4.1 Privilege to Refuse to Testify

As in criminal trials, witnesses that are summoned to appear in civil lawsuits are generally obliged by law to give testimony.[335] Only if they have been awarded a privilege to refuse to testify can they refrain from making a statement. In such cases, the interest of taking testimonial evidence is considered subordinate to the interests of secrecy. In that respect, the privilege constitutes an exception to the use of relevant information in the course of civil proceedings.

As in criminal law, so in civil law; the privilege is awarded based on relational or on professional grounds. In the first place, relatives and (ex-)

335 Further, see Chapter Eight.

partners of the parties can refuse to give testimony. The relatives that fall into this category may vary between countries, due to differences in domestic family law.[336] Secondly, the privilege will be awarded if making a statement implies that witnesses would incriminate themselves or any of the people that the relational privilege applies to. The privilege can also be granted to the litigating parties if they appear as party witnesses. Their position as witnesses during civil proceedings will be discussed in Section 4.4.4.2.

The third category is that of the professional privilege. In civil law, this privilege is largely awarded to the same professionals as in criminal law – it is related to certain features of their task.[337] As a result, lawyers, doctors, clergymen, and civil-law notaries are traditionally entitled to refuse to give testimony.[338] The services they offer are considered so important that their approachability and reliability must be secured by enabling them to maintain secrecy.[339] The 'traditional four' are generally recognised in the civil context, although jurisdictions differ in securing their privilege in legislation; some have opted for an open norm, while others have included an exhaustive list.[340] Other professionals have also been granted a privilege that enables them to refrain from testifying in civil court. Case-law criteria that have been discussed in the context of criminal law also apply here. The following criteria are therefore involved in assessing whether or not to grant a professional privilege: secrecy pledges,[341] mandatory legal qualifications and sector-specific disciplinary law, the homogeneous nature of a professional's group of 'clients', a legal duty for the public to make use of a professional's services, and the homogeneous nature of a professional's duties.[342]

The mediator is one of the professionals whose ability to refuse to make a statement has been examined. Mediation can be used as a means to resolve civil disputes. The depositional position of the mediator has been regulated in a few jurisdictions. It exceeds most regulations of the mediator's position in criminal law, because civil mediation is used more regularly and is thus further elaborated. As a result, the mediator in civil cases has been granted a privilege in a number of countries, which have included the mediator's privilege in legislation.[343] Some examples will be discussed below.

336 See also Fernhout 2004, pp. 330-331.
337 Fernhout 2004, pp. 166ff.
338 See Section 4.3.5.2. See also Fernhout 2004, pp. 199-207; and M. Pel & M.A. Vogel (eds.), *Mediation en vertrouwelijkheid*, The Hague: SDU Uitgevers 2004, pp. 37-38 and 68-71.
339 Further, see Section 4.3.5.2 and Fernhout 2004, pp. 190-191.
340 For an overview of the situation in West-European countries, see Fernhout 2004, pp. 332ff.
341 Although this does not automatically imply that a privilege to refuse to testify is awarded.
342 See also Pel & Vogel 2004, p. 37.
343 See also Fernhout 2004, pp. 240-241 and 327.

Article 1728 of the Belgian Judicial Code (*Gerechtelijk Wetboek*, GW) states that the parties in mediation are not allowed to summon their mediator as a witness. If mediators contravene this rule, they can be imprisoned or fined.[344] Article 131-14 of the French Code of Civil Procedure (*Code de procédure civile*, CPC) excludes 'findings of the mediator and the declarations he has taken down'[345] from being used in any proceedings. A similar provision can be found in Article 320, paragraph 4 of the Austrian Code of Civil Procedure (*Zivilprozessordnung*, ZPO). Norway has included the mediator in its list of professionals that are granted the privilege; Article 205 of the Norwegian Code of Civil Procedure (*Tvistemålsloven*) lists the mediator in divorce matters next to priests, lawyers, and doctors. In the United States, a privilege for the mediator has been incorporated in Article 4, paragraph b.2 of the Uniform Mediation Act (UMA),[346] which puts forward guidelines that federal States should incorporate in their legislation. The mediator's privilege is consequently recognised in various state laws. The UMA states that mediators are entitled to refuse to disclose 'mediation communication', and may also 'prevent any other person from disclosing a mediation communication of the mediator'. The UMA provision, however, is not absolute; mediators may renounce their privilege if both the mediator and the parties unambiguously agree to this. In case law, this rule has been relaxed to the extent that the mediator can be heard if both parties explicitly so request, even if the mediator has not consented to appear as a witness.[347]

The main reason why these countries award the mediator a privilege is related to the importance of keeping the mediation's proceedings confidential. In civil mediation, the parties often have similar interests in maintaining secrecy, because they initially operate on equal terms. They may both want to prevent the disclosure of personal or business-sensitive information. For these reasons, and as the examples given above show, mediators in civil cases may refuse to testify, even when they do not meet the case-law criteria. Nevertheless, some jurisdictions do not grant a privilege to civil mediators, because they do not comply with these requirements. For example, in the Netherlands, mediators are not entitled to refrain from giving testimony because they are not subject to mandatory

344 Art. 1728, para. 1 GW in conjunction with Article 458 of the Belgian Criminal Code (*Wetboek van Strafrecht*, WvSr). According to Art. 1728, para. 2 GW, the same regime applies to an expert whose opinion is requested in the course of the mediation.

345 The official French text reads: '*Les constatations du médiateur et les déclarations qu'il recueille* […]'.

346 Please note that Art. 4, para. b.3 even extends the privilege to 'mediation communication' of 'non-party participant[s – RvS]'.

347 For example, see *Olam v. Congress Mortgage Company*, 68 F. Supp. 2d. 1110 (1999). In literature, this decision has given rise to discussion; see for example W.B Leah & K.E Rubin, 'Keeping the 'R' in ADR: How Olam Treats Confidentiality', 1999, through <http://www.mediate.com/articles/cprolam.cfm>; and R.C. Reuben, 'Deconstructing Confidentiality', 2000, through <http://www.mediate.com/articles/reuben.cfm>.

legal qualifications.[348]
A privilege can be relinquished under certain circumstances. In civil law, these situations are similar to those of criminal law. A professional privilege can be waived to prevent serious harm or injustice, because of legal provisions, or when the client consents to the disclosure of information.[349] The decision to make a statement, and thus to renounce a privilege, must be made by the professional.

4.4.4.2 Party Witnesses
Parties in civil proceedings can furnish evidence by hearing witnesses. Generally, summoned witnesses can only refrain from making a statement if they can invoke a privilege to refuse to testify. A special situation occurs when one of the parties gives testimony. In such instances, the parties can either make statements to substantiate their own claims, or furnish refuting evidence. They may appear as witnesses of their own volition, but they can also be summoned by the other party. Such oral evidence can conceivably be used to introduce information from a victim-offender mediation in court, since the parties (and the mediator) are often the only ones that were present at mediation sessions.

The procedural step of parties appearing as a witness is a factor common to most Western jurisdictions,[350] made possible by the *Dombo* judgement of the ECtHR.[351] In this judgement, the Court has stated that 'each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent'.[352] The Court held that one of the parties had been substantially disadvantaged, because it had not been allowed to make a statement due to its position as a party to the proceedings (Dutch legislation did not at the time allow litigants to testify). Considering that both parties had acted on an equal footing during the negotiations that preceded the civil procedure, the Court established a violation of Art. 6 ECHR,[353] thereby accepting the right of parties to testify.[354]

348 *Parliamentary Papers (Kamerstukken) II* 2001/02, 26352, no. 60. The Dutch government also notes that the absence of a professional privilege for mediators has thus far not raised serious issues (pp. 2-3). However, this point of view does not alter the fact that mediation organisations persist in calling for a privilege for mediators. See also Fernhout 2004, pp. 240-241; and Pel & Vogel 2004, pp. 38-39 and 88-90.
349 Please note the qualifications made in Section 4.3.5.2 and the *Olam* case in the United States described above.
350 Van Rhee (ed.) 2005, p. 189.
351 ECtHR 27 October 1993, App. No. 14448/88 (*Dombo Beheer B.V. v. the Netherlands*).
352 *Ibid.*, para. 33.
353 *Ibid.*, para. 35.
354 The European Court nevertheless expresses in para. 31 that 'it is not called upon to rule in general whether it is permissible to exclude the evidence of a person in civil proceedings to which he is a party'. The procedural unfairness was caused by the inequality between the parties in producing evidence. This could have been different if the party in question had had other opportunities to make a statement during the civil

Chapter Eight will discuss the possibility of party witnesses in more detail. Here, the restrictions that are imposed on such statements will be looked at, because such restrictions limit the use of potentially relevant information during civil proceedings. Two limitations are common to most jurisdictions.[355] In the first place, the conclusive force of party-witnesses statements is restricted; it functions primarily as a subsidiary means of evidence that must be supported by other proof.[356] Secondly, the party being heard as a witness in its own case cannot invoke a relational privilege. Procedural inequality of arms might ensue if family members that are parties in civil litigation could invoke the relational privilege, while non-family parties would remain subject to the general rules applying to witnesses (which means that they would in principle be obliged to give testimony).[357] The privilege regarding the right against self-incrimination and the professional privilege remain in full force in the case of party witnesses.[358]

These restrictions on the statements of party witnesses – especially concerning the limited conclusive force of such statements – affect the possibilities of the parties to take evidence in civil proceedings. Considering that the parties (and the mediator) are generally the only ones that can disclose information from a mediation, this is a factor to be taken into account when assessing the admissibility of such information.

4.4.4.3 Exclusionary Rule

The parties in litigation can use all sorts of evidence to substantiate their claims. Gathering and using such evidence is bound by rules to prevent a violation of the notion of a fair hearing. A violation of these rules may cause an infringement of the fair-hearing requirements, and the evidence under discussion can be excluded by the court.[359] The exclusionary rule is the third exception to the use of information in civil action, since it prevents the use of unlawfully obtained evidence in court. As has been mentioned regarding criminal law, this may have implications for the admissibility of mediation information in court, if breaching the confidentiality rule would cause this information to be obtained unlawfully.

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proceedings. Whether a ban on party witnesses violates the right to a fair trial must therefore be assessed in the light of the applicable domestic law. See also M. de Tombe-Groothuis, 'Het Europese Hof en de partijgetuige', *Nederlands Juristenblad* 1994-6, pp. 185-188.

355 See also W. Hugenholtz & W.H. Heemskerk, *Hoofdlijnen van Nederlands Burgerlijk Procesrecht*, The Hague: Elsevier juridisch 2006, pp. 91-92.

356 This may, however, be different if the subsidiary nature of the party statement causes an infringement of the equality-of-arms principle. See the *Dombo*-judgement of the ECtHR of 27 October 1993, App. No. 14448/88 (*Dombo Beheer B.V. v. the Netherlands*); and Van Rhee (ed.) 2005, p. 251.

357 See also Fernhout 2004, pp. 127ff.

358 See further Section 4.4.4.1.

359 Murphy 2005, pp. 55-57; and Embregts 2003, p. 237. Reducing the sentence and dismissing the case naturally do not apply to civil law.

The decision to exclude certain evidence is left to the discretion of the civil court. If the court decides that exclusion is called for, it must formally disregard the evidence concerned.[360] As is the case in criminal law, applying the exclusionary rule aims at repairing the harm that has been caused by unlawfully obtaining the evidence concerned. In addition, the exclusion of evidence in criminal proceedings demonstrates to the public that the government is bound by its own rules. The reason for this is that the proof in criminal cases will have been gathered by the criminal justice authorities, whereas in civil cases, the parties themselves are responsible for taking evidence.

The main shortcomings of the exclusionary rule in civil law pertain to the limiting effect it may have on the parties' possibilities to substantiate their claims, and the risk that the court's deliberations may be influenced by the excluded evidence, although it formally disregarded.[361] Furthermore, the autonomous position of the parties during litigation may be affected by the 'patronising' decision of the court to exclude the evidence concerned.[362]

The remarks that have been made in Section 4.3.5.3 about the guidance offered by the ECtHR also apply here.[363]

The assessment of grounds for the exclusion of unlawfully obtained evidence largely depends on a judicial balancing of interests. Apart from the overall fairness of the proceedings, grounds for applying the exclusionary rule are hard to deduce, due to the differences in legal systems. Nevertheless, a few general criteria can be distinguished. On the whole, they resemble those that have been mentioned pertaining to criminal law, and their importance also follows from the fact that they entail incentives not to submit certain information in court.

The first criterion is the question to whom the allegedly violated norm applies – is it directed at one of the parties, or at a third person that is involved in the proceedings in a non-party capacity? In such situations, the evidence concerned may be admissible, depending on the gravity of the violation. This criterion is used in the Netherlands, where unlawfully obtained evidence that has infringed a norm that is directed at a third person is generally admissible (but the gravity of the violation must be taken into consideration).[364] In the United States, unlawfully obtained evidence is, as a rule, admissible if the unlawfulness is directed at a third person.[365]

Another issue concerns the causal relationship between the unlawfulness and the resulting evidence. Civil law courts do not easily apply the

360 See also Section 4.3.5.3.
361 On these matters, see also Embregts 2003, pp. 241-242.
362 However, this does not exclude that the position of the parties might be unequal in practice, for example, if a private person opposes a multinational.
363 For more on the meaning of the notion of a fair trial in relation with the exclusionary rule in a civil-law context, see Murphy 2005, pp. 52-53; and Embregts 2003, pp. 243-244.
364 Embregts 2003, pp. 246ff.
365 Taslitz, Paris & Herbert 2007, pp. 604ff.

exclusionary rule to issues of this kind, but when no connection can be established, the evidence is allowed.[366]

Other factors that play a role in the assessment of the admissibility of unlawfully obtained evidence include the seriousness of the unlawfulness, and the question whether the evidence could also have been obtained in a lawful manner. These criteria are used in, for example, the Netherlands and Germany.[367]

4.5 Conclusion

Using victim-offender mediation to deal with crime means that this process interacts with the criminal and civil law systems. For a proper assessment of the confidentiality issues identified in Chapter Three, the main features of these systems, and of victim-offender mediation, must be taken into consideration. These features constitute the boundaries of this assessment, since their essential nature dictates that they should be observed under all circumstances. The main focus in this chapter has been on how these systems deal with information – the rules on gathering and furnishing evidence, and the restrictions on the use of such evidence. Consequently, the research framework consists of three pillars.

The first comprises the essentials of victim-offender mediation: the acknowledgement of basic facts, the voluntary consent to participate, and the parties' right to information. A violation of these requirements would subvert the mediation procedure, and for that reason they should be complied with.

The second pillar is formed by the fundamental features of criminal law. A primary observation is that criminal law attaches great importance to the fact-finding process. It facilitates the clarification of the actual course of events and the relevant characteristics of the suspect(s) and/or the accused. Both aspects are taken into account in criminal proceedings in order to respond in a manner befitting both the crime and the alleged offender. To protect the rights of the accused and secure the fairness of the proceedings, the right to a fair trial has to be complied with in the course of the criminal administration of justice. From the right to a fair trial, other essentials of criminal law can be deduced: the right to adversarial proceedings, the right to an oral hearing, the right against self-incrimination, the right to a public hearing, and the presumption of innocence. These rights should be honoured in order to secure the potential use of mediation information in criminal court. The final element of the criminal pillar consists of three significant limitations on the fact-finding process; the restricted use of coercive powers, the privilege to refuse to testify, and the exclusionary rule.

366 Embregts 2003, pp. 248-249.
367 Embregts 2003, pp. 253ff.

The third pillar concerns civil law. An important feature of civil litigation is the relatively active role of the litigating parties. It is up to them to determine the object of litigation, and it is primarily their responsibility to submit their claims and to furnish the evidence that is necessary to substantiate these claims. Civil proceedings – including evidence rules – are governed by the notion of a fair hearing and its derivatives. The relevant elements are the right to adversarial proceedings, the right to an oral hearing, and the right to a public hearing. The usability of mediation information in the civil administration of justice depends on the observance of these rights. The civil pillar also contains restrictions on the use of information: the privilege to refuse to testify, the restricted conclusive force of party-witness statements, and the exclusionary rule.

The tenets identified will structure the remainder of this book, constituting a framework for the discussion of confidentiality issues.

PART THREE

CONFIDENTIALITY FRICTIONS

5 Out-of-Court Disclosure to Third Parties

5.1 Introduction

The contents of a victim-offender mediation can potentially be disclosed to two categories of recipients; those that are in some way involved in the judicial system, and those that are not. This chapter will discuss disclosure to the latter category. Issues regarding the divulgence of mediation information to first-category parties will be examined in the following chapters.

Due to the focus of this chapter, the tenets of criminal and civil law identified in Chapter Four do not apply here, since out-of-court disclosure does not concern the admissibility of information in court. Therefore, the observance of the fair-hearing requirements is not relevant in this context and consequently, only the first part of the research framework – the fundamentals of victim-offender mediation – will play a role here. Attention will primarily be paid to the advantages and disadvantages of breaching confidentiality for the mediation parties, and to how this affects the mediation essentials discussed in the previous chapter. This way, the possibilities of the mediation participants to talk to third parties about the mediation will be examined. This approach implies a collective discussion of the three modalities of victim-offender mediation, considering that their position *vis-à-vis* the criminal justice system is of little significance in this context.

This chapter will first give an overview of the issue of out-of-court disclosure and then discuss how the issue should be dealt in the context of victim-offender mediation.

5.2 Overview

The current wording of the principle of confidentiality seems to imply that it also prohibits sharing mediation information with third parties outside court.[368] In Chapter 3.5.1, the reasons for observing secrecy of mediation information were discussed. These also apply here. Respecting the mediation's confidential nature *vis-à-vis* the non-legal environment facilitates communication during the mediation, and thus contributes to a successful conclusion of the procedure. Furthermore, the confidentiality rule prevents the parties from questioning each other's commitment to the mediation process; wrongful disclosure can endanger the fragile relationship between victims and offenders and reduce the willingness of the parties to

368 D. van Ness, 'Proposed Basic Principles on the Use of Restorative Justice', in: A. von Hirsch *et al*. (eds.), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?*, Oxford: Hart 2003, p. 171.

reach an agreement.

A second reason for observing confidentiality relates to the fact that information from a mediation can be requested during subsequent legal proceedings. In the forthcoming chapters, guidelines for the disclosure of such information in court will be developed. If it were allowed to submit mediation information in court, this information would largely concern legally relevant issues. Out-of-court disclosure relates to other matters, such as information about how the participants have experienced the mediation, their satisfaction with the outcome, or their opinion of the other party. Out-of-court disclosure may cause this kind of information to be made public – for example, if it is disclosed to the media – while it is not open to disclosure in court. Such disclosed information might create a particular image of the case, despite the fact that the information concerned may be irrelevant to or disallowed from the court proceedings.

Consequently, the victim and the offender that have participated in one of the three types of victim-offender mediation currently seem to be forbidden to share their experiences with others, including their family and friends. The same goes for the mediator, and for any (professional) supporters or caregivers of the parties. Out-of-court recipients can also include the media, and other parties that belong to the personal environment of the mediation participants, such as employers, schools, sports clubs, insurance companies, and government institutions. Information that has come up during a mediation session could conceivably be of interest to these third parties. For example, family and friends may want to offer support to the victim and the offender, the media may want to publish a juicy story, and schools may be interested in punishable behaviour of one of its students.

Although the ban on disclosure is based on the principle of confidentiality, the current interpretation of this rule has drawbacks for mediation participants. Talking about significant experiences increases the overall wellbeing of the victim and the offender. Since the meeting with the other party can be regarded as such an experience, the participants in mediation may benefit from sharing their thoughts and feelings on the mediation process with others. Social studies have demonstrated that self-disclosure of significant information improves both physical and psychological health.[369] Among other things, such disclosure is reported to have a positive effect on

369 J.W. Pennebaker, 'Emotion, Disclosure, and Health: An Overview', in: J.W Pennebaker (ed.), *Emotion, Disclosure, and Health*, Washington DC: American Psychological Association 1995, p. 8; and J.W. Pennebaker, 'Putting Stress into Words: Health, Linguistic, and Therapeutic Implications', *Behaviour Research and Therapy* 1993-6, p. 539. See also B. Rimé, G. Herbette & S. Corsini, 'The Social Sharing of Emotion: Illusory and Real Benefits of Talking about Emotional Experiences', in: I. Niklíček, L. Temoshok & A. Vingerhoets (eds.), *Emotional Expression and Health. Advances in Theory, Assessment and Clinical Applications*, Hove/New York: Brunner-Routledge 2004, pp. 29-42, where it is emphasised that sharing emotional experiences with others helps the person that shares to 'make future life possible and meaningful in spite of what happened' (p. 40).

the number of physician visits, reported physical symptoms, psychological distress, and adaptive skills.[370] Emotional expression and sharing are assumed to stimulate emotional recovery.[371] Especially self-disclosure of negative experiences to supportive significant others, such as partner/spouse, family, and friends, is believed to have a positive effect on the level of symptoms of posttraumatic stress disorder;[372] positive reactions of confidants in the discloser's immediate environment enhance the latter's potential to deal with the events that he or she has been exposed to.[373]

Sharing significant information with others has long proven to have a positive effect on the health and wellbeing of individuals. This conceivably also goes for the participants in mediation, especially for the victim and the offender. During the mediation, the victim and the offender discuss the crime that has happened and how it has affected them. They can discuss the circumstances that have led to the crime, offenders can elaborate on their motives, and victims can explain the consequences the crime has had for them. Discussing these issues in face-to-face meetings may have a huge impact on both parties. For victims, facing the perpetrator that has inflicted pain or harm on them can be very confronting. Offenders may experience similar feelings when encountering the person they have victimised or when being confronted with the consequences of their acts. Victims and offenders may feel isolated when they are subsequently unable to share their mediation experiences with others.[374] Victims may even suffer secondary victimisation. Not allowing the victim and the offender to talk about a mediation with their family and friends can have a negative impact on their overall wellbeing.

Another drawback concerns the appeal of taking part in victim-offender mediation. For its success, penal mediation depends on voluntary participation. The appeal of participation may be negatively affected by the current prohibition on out-of-court disclosure; this may expose the participants to feelings of frustration and loneliness due to the ban on self-disclosure. In addition, a negative impact on the parties' wellbeing may influence their dedication and willingness to contribute to the mediation procedure. Since research seems to indicate that prohibiting self-disclosure

370 M.A. Greenberg & S.J. Lepore, 'Theoretical Mechanisms Involved in Disclosure. From Inhibition to Self-Regulation', in: Niklíček, Temoshok & Vingerhoets (eds.) 2004, pp. 43-44.

371 F.W. Winkel, 'Peer Support Groups: Evaluating the Mere Contact/Mere Sharing Model and Impairment Hypotheses', *International Perspectives in Victimology* 2006-1, p. 102.

372 E.E. Bolton *et al*., 'The Relationship Between Self-Disclosure and Symptoms of Posttraumatic Stress Disorder in Peacekeepers Deployed to Somalia', *Journal of Traumatic Stress* 2003-3, pp. 208ff.

373 Bolton *et al*. 2003, p. 209.

374 This has also been pointed out by the European Forum for Victim Services in its *Statement on the Position of the Victim within the Process of Mediation* (2004). The document states that the victim and the offender should be enabled to discuss the process they have been involved in with friends, relatives and other supporters.

affects psychological health, doing so may hold victims and offenders back from participating as fully as possible. So, even though mediation confidentiality is an incentive for victims and offenders to participate,[375] it may also discourage them from engaging in mediation. The required level of secrecy seems to be a crucial element in this respect; the confidentiality of mediation information should not have a deterring effect on the parties' willingness to participate, because it is either too strict or too relaxed.

Furthermore, the benefits of self-disclosure correspond to the underlying thought of victim-offender mediation. Victim-offender mediation focuses partly on acknowledging the needs and feelings of both victims and offenders to help them deal with the crime concerned and its aftermath. Self-disclosure serves the same goal, since it enhances the coping skills of the persons concerned. Prohibiting victims and offenders to share their experiences may therefore be counterproductive and undermine one of the objects of victim-offender mediation. These potential consequences of the currently advocated ban on disclosure to out-of-court third parties speak in favour of reconsidering the required level of confidentiality.

An additional point is that in practice it is hard to enforce the observance of the principle of confidentiality regarding out-of-court disclosure. It is impossible to monitor all communication of the mediation participants, especially where their private lives are concerned. For the same reason, it is hard to assess the scope of the problems that may arise. Trying to force the participants to observe confidentiality *vis-à-vis* out-of-court recipients might undermine the significance of the confidentiality rule. For that reason, this chapter aims at developing guidelines to indicate the appropriate level of confidentiality for out-of-court disclosure.

From the above it follows that, although victim-offender mediation is generally considered to benefit from a measure of confidentiality, the observance of the resulting secrecy *vis-à-vis* the non-legal environment of the mediation participants may have ramifications that necessitate reconsideration. What must therefore be contemplated is *to what extent* the current interpretation of the principle of confidentiality is to be maintained.

5.3 The Permissibility of Out-Of-Court Disclosure

This section will discuss the advisability of allowing the mediation participants to talk with others about their experiences.

The first category of recipients is that of the immediate environment of the mediation participants, namely their family and friends. Above, a ban on

375 See Chapter 3.5.1.

self-disclosure denying the mediation participants the benefits that result from sharing information with significant others was named as one of the main disadvantages of the current interpretation of the confidentiality rule. This holds especially true for the victim and the offender, who may both experience their encounter during the mediation as an important and unnerving event. Talking to their social environment about what has happened during the session can improve their mental health and reduce stress. Furthermore, it prevents feelings of loneliness that may arise because the parties feel that they have to deal with their experiences alone.[376] Additionally, self-disclosure to the immediate environment may have a positive effect on the willingness of victims and offenders to contribute to the mediation. This corresponds to one of the objectives of mediation itself, which partly aims at enabling victims and offenders to deal with the crime that has happened and its aftermath. For these reasons, victims and offenders should be allowed to share their experiences with their immediate environment.[377] The fact that this implies a breach of the confidential nature of mediation is not sufficient justification for maintaining the current ban on disclosure, since talking to family and friends generally presupposes a private setting. The risk that the information that is discussed with these third parties will be widely publicised can be considered negligible. When one of the confidants does disclose the information that came to their knowledge, this can be considered an unavoidable side effect; if the mediation participants feel aggrieved by this, they may try to sue for breach of privacy.

Victims and offenders may seek the support of non-professional caregivers during a mediation procedure, such as close friends or parents. Since highly sensitive information can be discussed during a mediation, such non-professional supporters may also feel the need to talk about these issues in their social environment. Nevertheless, their position in mediation differs from that of the victim and the offender. Generally, non-professional caregivers will have willingly taken on the commitment to support one of the parties during the mediation. This implies that they should refrain from doing so if they expect not to be able to deal with the encounter and discussions during the session. If non-professional caregivers are unaware of the consequences of providing assistance during victim-offender mediation, it is important that they too are adequately prepared for the session. Non-professional supporters will obviously be less involved in the crime than the victim or the offender, and for these reasons their sharing needs cannot be equated to those of the victim and the offender. Although it may be

376 N.E. Mahon, 'The Relationship of Self-Disclosure, Interpersonal Dependency, and Life Changes to Loneliness in Young Adults', *Nursing Research* 1982-6, p. 345. The findings of this study support the idea that the process of disclosing oneself decreases the likelihood of experiencing loneliness.

377 This point of view is also advocated by The European Forum for Victim Services in its *Statement on the Position of the Victim within the Process of Mediation* (2004).

disconcerting for non-professional caregivers to, for example, participate in a meeting with the perpetrator who has victimised someone close to them, they should abstain from taking part in such meetings, rather than divulge mediation information to others – they freely chose to participate and their position is less vulnerable.[378]

The professionals that can attend mediation sessions are the mediator and professional caregivers of the victim or the offender, such as a victim services worker or a probation officer. Although they may learn shocking information during the session, the professional nature of their involvement implies that they must not discuss mediation information with others. Only if it were to be considered in the interest of improving the quality of their work, should professionals be allowed to talk about their mediation experiences with, for example, their superior or a co-worker. Sharing mediation information for these reasons will generally not cause problems, since the information will usually remain within the organisation the professional caregiver is working for. For example, if victim services workers discuss their experiences with their peers, the information concerned must subsequently not be shared with parties outside the organisation of victim support; according to various instruments, victims are entitled to having the information they share with a victim services worker remain confidential.[379] This right to confidentiality does not address individual professional caregivers, but their organisation. In addition, professionals should not be allowed to disclose mediation information to their social environment, even though disclosure can neither be ruled out, nor can it be verified. They should be able to deal with the issues concerned, since they can be considered part of their job. What adds to this is that some professionals must observe secrecy due to the nature of their profession (e.g., mental health professionals or therapists that support the victim or the offender during the session).

The above-mentioned guidelines regarding self-disclosure of the mediation participants to their immediate environment are primarily normative in nature, considering that it will be virtually impossible to enforce them in practice. When the occasion arises, the injured party may sue for libel or wrongful disclosure, and sector-related disciplinary law may apply if a professional caregiver breaks his pledge of secrecy; wrongful

378 The voluntary nature of the participation of the victim and the offender does not lead to the same conclusion, because they will be more affected by the encounter with the other party and thus have more pressing needs of self-disclosure. Secondly, the 'appeal' of taking part in victim-offender mediation should not be endangered for these parties, since mediation will not be possible without the participation of victims and offenders. This is different where non-professional supporters are concerned. The fact that they mainly provide assistance to one of the parties implies that their commitment (possibly enhanced by self-disclosure) to the mediation is less important for its success.

379 E.g., *The Statement of Victim's Rights of Standards of Service* of the European Forum for Victim Services (1998); and *The Code of Practice for Victims of Crime* of the UK Home Office (2004).

disclosure in this context has not been criminalised otherwise. To safeguard the observance of the guidelines mentioned above, it is important that the extent of the confidentiality rule is adequately explained to all participants before the start of a mediation.

The second-category recipients are the media. Victim-offender mediation deals with crime. Therefore, the issues discussed, such as the circumstances that have caused the offender to commit the crime, may be considered newsworthy or even sensational. For these reasons, the media can be interested in the information shared by the mediation participants during the mediation sessions.

It is unlikely that the victim or the offender will tell their story to the media because of the self-disclosure benefits, which have been discussed above. Disclosure to the immediate environment has proven to be primarily beneficial in this respect. Individuals seeking psychological relief are therefore more likely to turn to their family and friends. Disclosure to the media will sooner be inspired by other motives, such as frustration or vengefulness. Such grounds may, for example, result from an uncooperative attitude of the offender during the mediation causing the process to be terminated. The victim may then be tempted to blacken the offender's character by reporting the offender's disruptive behaviour.

Disclosure for reasons such as revenge does not correspond to the main goals of mediation, namely to reach an agreement that is based on the true needs and feelings of the participants. The vital yet fragile relationship between the victim and the offender will conceivably be damaged if one of them shares mediation information with the media; allowing victims and offenders to do so would most likely jeopardise the mediation concerned as well as the reliability and appeal of victim-offender mediation in general. Furthermore, a ban on disclosure that is prompted by such motives will not have similar drawbacks (such as secondary victimisation) for victims and offenders as prohibiting disclosure to their immediate environment does. Vengefulness is believed to have negative consequences for the overall wellbeing of individuals, and has been found to be correlated to greater rumination about an offence and lower life satisfaction.[380] The interest of victims or offenders (i.e., acting on vengeful feelings) in disclosing information to the press therefore does not prevail over the significance of observing mediation confidentiality. Consequently, making an exception to the principle of confidentiality is neither necessary nor advisable in this context.

Another reason to continue to observe the confidentiality rule pertains to the risk that disclosure to the media infringes fundamental rights of the

380 M.E. McCullough *et al.*, 'Vengefulness: Relationships With Forgiveness, Rumination, Wellbeing, and the Big Five', *Personality and Social Psychology Bulletin* 2001-5, p. 601. In this context, see also D.T. Miller, 'Disrespect and the Experience of Injustice', *Annual Review of Psychology* 2001, pp. 542ff.

mediation participants, such as the right to privacy and private life. What should also be prevented is that information from a mediation is used to foster a 'trial by media', especially when the mediation can or will be followed by criminal proceedings (mediation modalities one and two, respectively). Information that should be kept out of court due to the guidelines to be developed in the following chapters must not become available to the press.[381]

This also applies to the mediator and the professional and non-professional caregiver: they are not allowed to talk to the press about their experiences in mediation. In addition, the issues mentioned above relating to disclosure to family and friends by these participants also apply here.[382]

Violation of the directions concerning disclosure to the media is currently not punishable. An infringement of basic rights of one of the participants can nevertheless be challenged. Furthermore, some professionals may be subject to sector-related disciplinary law. Thoroughly informing the mediation participants about the scope of confidentiality remains the most important way of preventing problems.

The third category of recipients consists of a variety of institutions that are part of the environment of the mediation participants, such as schools, companies, churches, insurance companies, and sports clubs. Whether disclosing mediation information to such institutions should be allowed depends on the reason(s) for disclosure. When a victim divulges information about the offender's utterances regarding the crime to, for example, the offender's employer with the intention of discrediting the offender, sharing information is likely to be inspired by negative emotions such as vengefulness. A breach of confidentiality prompted by such sentiments (similar to reasons discussed above regarding disclosure to the media) should be rejected.

However, in some cases sharing information with institutions may benefit the victim and the offender; among other things, it can enable the institutions to properly deal with the victim and the offender in the future. For example, when a victim, an offender, or both, are students, their school(s) may have pedagogical reasons for requesting information about the contents of a mediation. Such information may help the school to pay the necessary attention to their students after the mediation has ended. Furthermore, schools may play a role in the rehabilitation of the mediation

381 See also K. Lauwaert, *Herstelrecht en procedurele waarborgen*, Apeldoorn/Antwerp: Maklu 2008, p. 292; and J. Dignan *et al.*, 'Staging Restorative Justice Encounters against a Criminal Justice Backdrop: A Dramaturgical Analysis', *Criminology and Criminal Justice* 2007-1, pp. 20 and 23.

382 Although the contents of a mediation should not be discussed with the media, the media may play a role in explaining a mediation programme to the general public, and keeping it informed of new developments. See also United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes*, New York: United Nations 2006, p. 79.

participants, and can thus ease the continuation of their school life. Potentially relevant information may include a cooperative attitude of the offender, apologies from the offender, or even an admission from the victim that he or she in some way contributed to the crime. Disclosing such issues to the school would help rather than damage the offender. Other institutions that are part of the social lives of the parties may have similar interests in learning mediation information. If, for example, a member of a sports club participated in a mediation with another member regarding a complaint of assault, information about the proceedings of the mediation may enable the sports club to vindicate the accused member, or to keep an extra eye on him or her if necessary. For these reasons, sharing mediation information with these recipients should not be prohibited in all cases.

Disclosure in these situations should first of all be possible if the victim and the offender both recognise the benefits of disclosure, and agree to it.[383] The victim and the offender may also include the disclosure of certain information as a condition in the mediation agreement. The resulting awareness of the informed institution may then function as a form of reparation for the victim, and entail an extra guarantee that the offender will not relapse. Secondly, offenders (or their parents) may deem it necessary to discuss the mediation procedure with the institution concerned in order to facilitate the offender's participation in or membership of the institution. Victims may also want to disclose certain information, for example, to inform their insurance companies after they have been victimised in a traffic accident; in the course of the investigation into who should be held responsible and pay damages, the insurance company may request mediation information. If only one of the parties is in favour of sharing mediation information with others, it is initially up to this party to decide whether to proceed with disclosure. If the other party (in the example above concerning insurance companies, the offender) feels aggrieved by the revelation of the mediation information concerned, he or she may sue the party that disclosed these matters. The interests involved should then be weighed carefully; offenders should not be discouraged from participating in victim-offender mediation, but under certain circumstances, other interests may prevail, such as the insurance company's financial interest in determining who is responsible for an accident that has caused the victim to be on extended leave.

The professional and non-professional caregiver and the mediator should in principle observe confidentiality. The reasons mentioned above pertaining to these mediation participants also apply here. However, an exception should be made when the victim and the offender agree that it would be best if one of these participants informed the institutions of the

383 Disclosure of mediation information based on mutual agreement is always possible, as also follows from the Council of Europe Recommendation and the United Nations Basic Principles.

matters discussed above. For example, the victim can decide to disclose certain information against the offender's will, with the victim services worker present during the mediation supporting this decision. The professional and non-professional caregiver concerned should then decide whether to support the victim or not. Again, the offender may object by going to civil court. Mediators should initially show reservation in such situations, due to their impartial position *vis-à-vis* the parties.

Violation of confidentiality has not been criminalised for disclosure to third-category recipients. An injured party may again bring action to seek compensation for wrongful disclosure, and sector-related disciplinary law may be applicable with regard to the professionals involved. Here too, providing the mediation participants with the necessary information is of great importance. In addition, the mediator should ensure that victims and offenders are aware of the implications of disclosing certain information.

5.4 Conclusion

This chapter has dealt with the first friction caused by the principle of confidentiality as identified in Chapter 3.6, namely that of out-of-court disclosure to third parties. The current interpretation of the confidentiality rule seems to indicate that the participants in mediation should not reveal anything that is said and done during a mediation. As a result, mediation confidentiality also extends to the non-legal environment of the mediation participants. This, it is hoped, will prevent the readiness of the victim and the offender to participate in mediation from dwindling. The same goes for the free sharing of information during mediation sessions. Prohibiting disclosure to out-of-court third parties also precludes the information concerned from becoming known without good cause to the actors in a subsequent legal action. The ban on disclosure to out-of-court recipients implies that the participants in mediation must not talk about their experiences with their immediate environment (family and friends), the media, or institutions that they may participate or be involved in (schools, sports clubs, employers, insurance companies, etc.). Despite the benefits of this approach, it does have a number of drawbacks. Self-disclosure of major events – especially to the immediate environment – has been found to improve psychological health and to reduce symptoms of stress. Apart from diminishing the appeal of taking part in victim-offender mediation and undermining the parties' willingness to cooperate, depriving the victim and the offender of the opportunity to share their mediation experiences with their family and friends may have the opposite effect.

For these reasons, the victim and the offender should be allowed to discuss their mediation process with their family and friends. Non-professional caregivers should not be not allowed to do so, because of the different nature of their involvement. The same goes for the mediator and

the professional caregiver, because of their professional role.

The divulgence of mediation information to the media will in most cases be inspired by negative emotions such as vengefulness. Acting on the desire for revenge presumably serves neither the overall wellbeing of victims and offenders, nor the mediation process. The mediator and the professional and non-professional caregiver should not be allowed to talk to the media about mediation contents, because of the nature of their involvement and the damage such disclosure may do to the mediation process.

Divulging information to other institutions based on feelings of vengefulness should be prohibited for the same reasons. This goes for all mediation participants. However, it is conceivable that the parties agree on the disclosure of certain issues to such institutions, for example, if the disclosure of information is deemed to be beneficial to the victim and the offender, or if it is included as a condition in the mediation agreement. In such cases, talking about the contents of a mediation should be allowed. A party may also disclose information of his or her own volition if he or she considers this necessary. The mediator and the professional and non-professional caregiver should nevertheless observe the principle of confidentiality in these situations. This may be different if the parties agree on disclosure and request the professional caregivers to disclose certain information, or if professional caregivers feel that they should support disclosure by their clients.

The observance of the guidelines that have been developed in this chapter are hard to enforce in practice, especially since wrongful disclosure to these categories of recipients currently does not constitute a criminal offence. Where appropriate, injured parties may sue or challenge a violation of fundamental rights. Furthermore, the compliance of certain professionals with the observance of secrecy may be subject to sector-related disciplinary law. To prevent a violation of the principle of confidentiality and its advocated extent *vis-à-vis* the non-legal environment, it is essential that the participants in mediation are sufficiently informed about the implications and scope of the confidentiality rule.

6 Offender-Related Issues

6.1 Introduction

The frictions arising from the confidentiality rule to be discussed in this chapter and the next concern the disclosure of mediation information in court. These frictions prompt the question whether some information should be open to disclosure in spite of the confidentiality rule, and, if so, whether this information should be admissible as evidence during related legal proceedings. The current chapter will deal with two of these frictions that relate to the offender, namely offender behaviour that frustrates the success of a mediation, and a confession made by the offender during mediation.

As the focus here is on the use of information in court, the essential characteristics of criminal and civil law, identified in Chapter Four, will have to be taken into consideration. Furthermore, the moment of referral to mediation influences the likelihood that a mediation is followed by a criminal trial or civil litigation, and consequently raises the issue whether information from a mediation can be used during such subsequent proceedings. This logically affects the applicability of the essentials of criminal and civil law. For that reason, the question whether an exception to the principle of confidentiality is in order will be discussed for each of the three modalities of victim-offender mediation separately.

The first friction to be discussed concerns undermining behaviour of the offender. Secondly, a confession made by the offender during mediation will be addressed. Both sections will start with an overview of the issue concerned. After that, the three mediation modalities will be examined. For each topic, the main findings will be summarised at the end of each section.

6.2 Offender Behaviour Frustrating Mediation Success

6.2.1 Overview

To offer a favourable setting for the interaction between the victim and the offender, victim-offender mediation has to meet various requirements. The main ones are the acknowledgement of the basic facts of a case by the victim and the offender, and the voluntary and informed nature of their participation. Mutual understanding about the main focus of the mediation and a voluntary and conscious decision to participate are considered preconditions for the success of mediation. Nevertheless, even when these conditions are fulfilled, the dialogue between the victim and the offender can still be disrupted by frustrating behaviour on either side. To enable the parties to reach an agreement, such behaviour should be prevented as much as possible. Nevertheless, if victims or offenders act in a way that reduces

the chances of success, this may affect the appropriate level of confidentiality that applies to such issues; it should then be questioned whether certain mediation information should be open to disclosure, in spite of its confidential nature. As the current chapter discusses the admissibility of mediation information in court, the mediation information concerned is mainly legally relevant information. As a result, not all mediation information that causes a discontinuation of the process should, when disclosed, be considered a breach of confidentiality. For example, if offenders explain their reasons for committing the crime, and victims find themselves unable to cope with these revelations, the latter should be able to end the procedure without consequences. After all, if such a situation automatically justified an exception to the principle of confidentiality, it would be impossible for victims and offenders to freely withdraw from the mediation at any time and to share any information with others. However, if the parties behave or express themselves in a way that causes unnecessary harm to the other party or the mediation process, disclosure of the information concerned must be considered an option.

The most striking example of such behaviour concerns other crimes. In the first place, offenders may talk about future crimes that they (or others) know about, or that they intend to commit in the future. Secondly, the offender can commit another crime against the same victim during mediation, for example, by threatening the victim with violence. Both situations, but especially the latter, may cause the victim to feel distressed and unsafe.

According to the current state of affairs, mediators are the only ones who are allowed to divulge information concerning other crimes. Nevertheless, their power to report crimes only extends to crimes that can be considered 'imminent' and 'serious'.[384] Due to the advocated strict interpretation of the confidentiality rule, the other mediation participants are currently not allowed to do so,[385] and mediation information regarding crimes that cannot be considered 'serious' must therefore remain secret. This not only concerns other or future crimes that offenders know about, but also crimes that they commit against victims during mediation.

Understandably, this situation can have drawbacks for the victim, who is unable to put forward the information concerned during judicial proceedings that follow a mediation.[386] This may result in feelings of

384 Paragraph 30 of the Recommendation.

385 This point of view is not absolute, since they may also have a reporting competence or duty based on domestic law.

386 Unless domestic law allows or obliges the victim to report such issues to the appropriate authorities. Victims can also report a crime against them to the police. However, the advocated interpretation of the principle of confidentiality seems to imply that mediation information about other crimes cannot be adduced during judicial proceedings that follow a mediation. If victims want to seek justice for a new crime an offender committed during the mediation, they must institute a new action, and cannot use this information in the proceedings that concern the crime the mediation focuses on.

frustration, distress, and secondary victimisation,[387] especially if the offender commits another crime against the same victim.

Behaviour of the offender that is related to other crimes is the main focus of this section, since it is the most striking example of behaviour that can frustrate a mediation process and harm the victim. As such, it is an indication to reconsider the appropriate level of confidentiality. The information concerned should perhaps be allowed to be disclosed and to be put to use during judicial proceedings that follow the mediation. Both aspects will be discussed below. Other offender behaviour which may also give cause for adjusting the scope of mediation confidentiality but which does not constitute a crime will be discussed in Section 6.3 and Chapter Seven.

6.2.2 Victim-Offender Mediation as a Diversionary Measure

The first type of victim-offender mediation to be discussed here concerns victim-offender mediation as a means of diverting cases from the criminal justice system. In such cases, the mediation session functions as the primary reaction to a crime. Consequently, diversionary victim-offender mediation is considered the most appropriate response to the types of crime it applies to. It offers victims and offenders the opportunity to talk about the consequences of the crime and how it has affected them, and to come to terms with each other and the criminal event that has happened. As mediation is apparently regarded as the preferable way of dealing with the crime in question, the parties must not be denied the opportunity to participate in victim-offender mediation without good cause. This would imply that victims are denied the benefits that mediation has to offer, because of offender behaviour that frustrates the mediation. On top of that, they may experience feelings of secondary victimisation caused by this behaviour. Furthermore, the failure of diversionary mediation can have a strong impact on how a case is handled. The offender will probably be brought to trial, and the victim's possibilities to be involved in dealing with the crime will diminish accordingly.[388] During regular criminal proceedings, victims have little opportunities to communicate directly with offenders, and

387 In Chapter 3.6.2.1, it was mentioned briefly that committing a new crime against the victim in the supposedly 'safe' mediation environment is likely to cause severe distress to the victim, because victims can experience secondary victimisation if they consider the offender's expressions of regret and apology to be insincere. See A. Opdebeeck, G. Vervaeke & F.W. Winkel, 'Bemiddeling in het strafrecht', in: P.J. van Koppen *et al*. (eds.), *Het Recht van Binnen*, Deventer: Kluwer 2002, pp. 941-942. The effect of an insincere apology on the victim will be discussed further in Chapter Seven.

388 See also M. Kilchling & M. Löschnig-Gspandl, 'Legal and Practical Perspectives on Victim/Offender Mediation in Austria and Germany', *International Review of Victimology* 2000-4, pp. 305-332.

to express their needs and feelings.[389]

In the case of diversionary mediation, the continuation of the criminal proceedings is a direct effect of the failure of the mediation. The cause of this failure can therefore be relevant when the case is dealt with in court. When the failure results from offender behaviour (the offender has committed another crime during mediation, or knows about future crimes), the court should consider using the information concerned because of the drawbacks of the offender's behaviour for the victim. For these reasons, it is reasonable to contemplate whether disclosure of information should outweigh confidentiality.

To assess the appropriateness of making an exception to the principle of confidentiality for information pertaining to other crimes, the exception must first of all be deemed compatible with the main characteristics of victim-offender mediation. As the principle of confidentiality is widely held to contribute to the success of victim-offender mediation, an exception should only be made if the disadvantages of observing confidentiality outweigh the consequences of a breach of secrecy. Such disadvantages may result from a violation of other mediation essentials. Secondly, it must be determined whether the disclosed information is admissible as evidence in court. This depends on the compatibility of making an exception with the essentials of criminal and civil law. Admitting mediation information as evidence must not violate the fairness of the judicial proceedings concerned. Thirdly, how does making an exception relate to the limitations on the use of relevant information in criminal and civil law? Since the principle of confidentiality may also restrict the use of potentially relevant information, similarities with these limitations may be an incentive to observe the principle of confidentiality.

The main characteristics of victim-offender mediation are the acknowledgement of the basic facts of a case by the victim and the offender and the informed and voluntary nature of the parties' participation. The acknowledgement of basic facts implies understanding between the victim and the offender of the focus of the mediation. This enables the parties to make a well thought-out decision about their participation, which contributes to the informed and voluntary nature of their consent to take

389 Research has shown that victims find it very important to be heard and that their procedural justice judgements are largely determined by how strong they feel their voice is heard (J.A. Wemmers & K. Cyr, 'What Fairness Means to Crime Victims: A Social Psychological Perspective on Victim-Offender Mediation', *Applied Psychology in Criminal Justice* 2006-2, p. 122). Furthermore, procedures that allow victims to be heard can effectively reduce the risk of secondary victimisation (Wemmers & Cyr 2006, pp. 124-125). However, in the case victims feel hindered in making demands, or feel that they are unable to make themselves heard, they experience the mediation process as unfair (Wemmers & Cyr 2006, pp. 122-123). These findings stress the significance of not denying victims the opportunity to participate in victim-offender mediation, and the importance of providing compensation if they are wrongfully impeded to take part.

part. The voluntary character of the participation of the victim and the offender also implies that they may withdraw from the mediation at any time. Moreover, the parties' freedom to decide whether to participate in victim-offender mediation implies that their ultimate decision to commit to the process signifies their intention to successfully conclude the mediation. The voluntariness requirement safeguards the parties from being pressured into taking part; their choice to participate implies that they are determined to bring the mediation to a favourable conclusion. Consciously frustrating the mediation process (for example, by committing another crime during the mediation) obviously conflicts with this, since the parties have the opportunity to withdraw without consequences. What adds to this is that victims and offenders take part in mediation on an informed basis.[390] This supposes that offenders are aware of their position *vis-à-vis* the victim, especially concerning the latter's vulnerability, and that they act accordingly. The offender's willing and conscious consent to participate in mediation indicates that he accepts the responsibility to contribute to the process and not to impede its success.[391] Consequently, an offender who bears malice against the victim or wants to harm the victim for other reasons does not pass muster for victim-offender mediation. This naturally also applies to an offender who commits another crime against the same victim during the mediation. In addition to information about the implications of participation, the parties should also be given information about the confidential nature of mediation, and about the issues that are consequently subject to secrecy.[392]

In conclusion, the three main characteristics of victim-offender mediation all aim at facilitating a proper course and satisfying conclusion of a mediation process, by ensuring that victims and offenders participate for the right reasons and with the right attitude.

Offender behaviour as discussed above, is likely to cause a frustration or termination of a mediation, and to cause harm to the victim.[393] If the offender commits another crime against the same victim during mediation, the victim will once again suffer a crime at the hands of the same perpetrator, but this time in the context of a procedure that supposedly

390 Paragraph 10 of the Recommendation and Paragraph 13(b) of the Basic Principles. See further Chapter 3.2.3.

391 As follows from the voluntary nature of their participation, the parties can withdraw from the process at any time without consequences. However, as a result of the responsibility they took upon themselves by agreeing to participate, a termination of the victim-offender mediation due to the offender adopting an uncooperative or unreasonable attitude should not be allowed to pass.

392 This might ultimately also include confidentiality guidelines developed in this book.

393 This should naturally be avoided, as also follows from the United Nations' Handbook on Restorative Justice Programmes, which states that the interests of the victim should be protected in all restorative processes, and that it is important to ensure that re-victimisation does not occur (United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes*, New York: United Nations 2006, p. 59).

offers a safe environment for the two parties to meet. Such an event understandably causes an unacceptable violation of the essential idea of mediation. The same applies to the situation where offenders reveal information about future crimes. Divulging such information to the victim, who will then realise that others will be victimised, and suffer a similar experience, can cause serious distress to the victim. Such offender behaviour cannot be regarded as behaviour that is to be expected from an offender who has consciously and voluntarily agreed to take part in victim-offender mediation. It rather seems to counteract the mediation requirements that enable and safeguard participation on this basis. Neither the victim nor the other mediation participants should therefore be denied the possibility of reporting such events. Additionally, the observance of the principle of confidentiality in this respect does not serve the aim of this rule to provide a safe environment for the communication between the victim and the offender. It rather creates an opportunity for the offender to harm the victim with impunity. Observing secrecy would then create immunity for the offender, instead of facilitating victim-offender mediation.

Disclosing information about additional crimes seems to be consistent with the main characteristics of victim-offender mediation. The second step concerns the compatibility of disclosure with the fundamentals of criminal and civil law. This aspect will be discussed below.

If mediation information is submitted in court, the notion of fair proceedings should be observed; disclosing such information should not endanger the fairness of judicial proceedings. The main characteristics of criminal and civil law in this respect were discussed in Chapter Four. They primarily offer guarantees to the offender during a criminal trial, or to the parties in civil litigation.

The essentials of criminal law that were identified are the right to a fair trial, the right to adversarial proceedings, the right against self-incrimination, the right to a public hearing, and the presumption of innocence. None of these rights opposes the admissibility of information about additional crimes in court. Nevertheless, they do lay down conditions on how the information is adduced. For example, if victims decide to disclose in court that they were threatened by the offender during mediation, the right to adversarial proceedings may mean that the offender should be given the opportunity to cross-examine the victim. Furthermore, if the exception to the principle of confidentiality for information regarding additional crimes is commonly accepted, it is important that this exception is included in the information that victims and offenders receive prior to a mediation. The offender (and the victim) will be aware that committing another crime or disclosing information about future crimes will not be subject to confidentiality and can be used in subsequent criminal proceedings.

Consequently, the essentials of criminal law do not oppose adducing

information about additional crimes, since submitting such information in court does not violate these essential requirements.

The relevant characteristics of civil law are the right to a fair hearing, the right to adversarial proceedings, the right to an oral hearing, and the right to a public hearing. If a mediation is followed by civil litigation, for example, to secure financial compensation, these rights must be honoured to safeguard procedural fairness. Information about additional crimes that the victim may want to furnish as evidence is thus only admissible in civil court if these fair-hearing requirements are observed.

The above-mentioned essentials of civil law are not incompatible with the use in court of information about additional crimes. Nevertheless, they may lay down conditions on how the information is adduced. The right to adversarial proceedings entails, for example, that the parties must be able to react to each other's claims and assertions. This implies that the offender should be allowed to respond if the victim furnishes information from the mediation as evidence.[394]

From this it follows that the essentials of criminal and civil law do not obstruct the admissibility of information about additional crimes as evidence. What remains to be considered is how the disclosure of such information in court relates to limitations on the use of relevant information during criminal or civil proceedings.

In criminal law, limitations on the use of information are scarce. To facilitate the fact-finding process, the criminal justice authorities have many investigation methods at their disposal, and there are few exceptions. The three existing limitations (see Chapter 4.3.5) are the restricted use of coercive powers, the privilege to refuse to testify, and the exclusionary rule. From these exceptions follows that a) restrictions on the fact-finding process can be made by law, b) some persons are allowed to refrain from giving testimonial evidence, and c) wrongfully obtained evidence can under certain circumstances be excluded.

None of these restrictions are relevant here. Since the mediation process does not concern gathering information by means of the exertion of coercive powers, the corresponding limitation does not apply. The same goes for the privilege to refuse to testify, as the current issue concerns the question whether certain information (about the offender's behaviour in mediation) is admissible in court. It is irrelevant whether someone can refuse to provide such testimonial evidence. Thirdly, the exclusionary rule does not give cause for a reconsideration of making an exception to the confidentiality rule; as the information concerned has been obtained neither unlawfully nor in

394 Naturally, such information may also be presented by offenders who are a party in related civil litigation. However, since this concerns information about offenders committing or planning other crimes, it is not likely that they themselves will adduce this information in court.

violation of fair-trial requirements,[395] the exclusionary rule does not affect the permissibility of such information in court.

Civil law also has few limitations on gathering information that can be relevant to civil litigation. The three limitations that follow from Chapter 4.4.4 concern the privilege to refuse to testify, the restricted conclusive force of the statements of party witnesses, and the exclusionary rule.

The privilege to refuse to testify and the exclusionary rule do not apply here for the same reasons as mentioned above regarding criminal law. The issue of the admissibility of a certain type of information makes the limited conclusive force of party-witness statements irrelevant.

The limitations on the use of relevant information in court are therefore not at odds with the admissibility of information about additional crimes in criminal or civil proceedings.

The conclusion must be that the offender committing another crime or divulging information about other or future crimes during mediation may constitute grounds for making an exception to the principle of confidentiality. This implies that the mediation participants are allowed to disclose such information after the mediation has been concluded. They can adduce this information as evidence in court, since this would not be inconsistent with either the essentials of criminal and civil law or the existing limitations on the use of relevant information.

6.2.3 Victim-Offender Mediation as Part of Regular Court Proceedings

The second mediation type concerns victim-offender mediation that is used as part of regular court proceedings. Although the seriousness of the offence may require that the offender is tried, concurrent referral to mediation can still benefit both the victim and the offender. It offers victims an opportunity to express themselves, and to try to come to terms with the crime and the offender through a dialogue with the latter. Similar possibilities to do so during the actual court proceedings are scarce, if not non-existent. Furthermore, mediation offers offenders the possibility to explain themselves, to make amends, and to accept and act on their responsibilities. For these reasons, victims and offenders should not be denied the option of participating in victim-offender mediation, due to behaviour of the other party that frustrates the mediation process, such as the behaviour of the offender concerning additional crimes.

The current modality of mediation will be followed by a criminal trial, and a successful mediation result may have a positive effect on the outcome of the criminal proceedings. This raises the question whether failed mediation should have adverse consequences. According to the United Nations Basic

395 This may lead to the exclusion of evidence (ECtHR 12 May 2000, App. No. 35394/97, paras. 34ff. (*Khan v. the United Kingdom*)).

Principles, this should not be the case; a failure to reach an agreement must not be used in subsequent criminal proceedings.[396] If, for example, the victim withdraws for reasons that have nothing to do with reprehensible behaviour of the offender, this indeed seems a justifiable position. After all, if failure to reach an agreement would in all cases have consequences, it would undermine essential victim-offender mediation requirements concerning confidentiality and voluntariness; the court would then have to examine the background of all mediation failures, and this would understandably harm mediation confidentiality as well as diminish the appeal of taking part.[397] In such cases, it would be best to simply resume the criminal proceedings after the mediation has failed. The outcome of the mediation can then no longer have a positive effect on the outcome of the trial, but the failure should not have additional negative consequences either, so as not to endanger the victim's and the offender's freedom to withdraw from the mediation process. However, conscious and reprehensible offender behaviour, such as committing another crime or disclosing information regarding other crimes, is an altogether different situation. The distress and harm such behaviour can cause to the victim and to the mediation process may justify the disclosure of the information concerned and its subsequent use in evidence as a form of compensation. Disclosing information in court may then induce the court to let the offender's behaviour influence the outcome of the criminal trial negatively.

This section will discuss whether behaviour of the offender concerning additional crimes justifies such consequences in the context of victim-offender mediation that is used as part of regular court proceedings. Is making an exception to the principle of confidentiality compatible with the fundamentals of victim-offender mediation, and do the fundamentals of criminal and civil law allow the use of such information as evidence in court?

What was observed above regarding diversionary mediation generally also applies to the compatibility of making an exception with victim-offender mediation fundamentals. The decision of offenders to participate in victim-offender mediation implies that they commit themselves to contribute to the procedure and to approach the victim accordingly.[398] Committing another crime against the victim or disclosing information about other crimes causes a significant violation of this assumption, and is harmful to the victim as

396 Paragraph 16 of the Basic Principles. See also D. van Ness, 'Proposed Basic Principles on the Use of Restorative Justice: Recognizing the Aims and Limits of Restorative Justice', in: A. von Hirsch *et al.* (eds.), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?*, Oxford: Hart 2003, pp. 171-172. Van Ness states that a lack of agreement should be treated as an 'interlude' in the criminal justice process, and that that process should be resumed if the attempt to reach an agreement in mediation fails. See also United Nations Office on Drugs and Crime 2006, p. 35.

397 See also Van Ness 2003, p. 172.

398 This goes for the victim too, of course.

well as the mediation process. Observing the principle of confidentiality would protect the offender rather than aid the mediation procedure. Consequently, the mediation essentials do not oppose the disclosure of information regarding additional crimes, in spite of the confidentiality rule.

Given this conclusion, the question arises whether the information concerned is admissible as evidence in court. This depends on the compatibility of the main features of criminal and civil law with adducing the information concerned as such.

As the current type of victim-offender mediation is in all cases followed by criminal proceedings, the observance of the right to a fair trial is of great significance. The fundamentals of criminal law concerning diversionary mediation do not obstruct the admissibility of information regarding other crimes. This also applies here. The right to adversarial proceedings demands that certain procedural safeguards are honoured. Furthermore, it remains important that the mediation participants are sufficiently informed about the implications and scope of confidentiality. As long as these requirements are met, submitting the information concerned as evidence does not infringe the fairness of the criminal proceedings.

The same goes for the main features of civil law. If the victim and the offender become involved in civil litigation – for example, because the issue of financial compensation has not been solved during the mediation or the criminal proceedings[399] – behaviour of the offender that has frustrated the mediation process may be relevant. For the information concerning the offender's behaviour to be admissible, the implications of the right to adversarial proceedings should be observed. For instance, the parties should be allowed to react to the evidence that is furnished by the other party.

According to the fundamentals of criminal and civil law, information from a mediation concerning additional crimes is therefore admissible during subsequent judicial proceedings. This may, however, be different if the existing limitations on gathering and using relevant information in criminal and civil law give cause for reconsideration.

The three criminal law exceptions do not oppose to the admissibility of information concerning additional crimes in court, for the reasons mentioned above regarding diversionary mediation. The same goes for civil law limitations.

In conclusion, the mediation participants are allowed to disclose information concerning other crimes when a mediation is part of regular court proceedings. As such disclosure is not inconsistent with either the main features of criminal and civil law or the existing limitations on gathering and using relevant information, the information concerned can be used as

399 See further Chapter 8.2.1.2.

evidence.

6.2.4 Victim-Offender Mediation after Conviction and Sentencing

The third modality of victim-offender mediation concerns mediation that takes place after the offender has been convicted and sentenced. As this type of victim-offender mediation will not be followed by criminal proceedings that deal with the same crime, the question whether information pertaining to other crimes can be used as evidence during criminal proceedings that follow a mediation is irrelevant here. This does not mean that a crime committed during the mediation cannot be the focus of a new criminal trial; the principle of confidentiality should not deny victims the opportunity to report a crime against them to the police. In such cases, the victim's report may occasion the prosecution of the new offence. This situation should be distinguished from the use of the information concerned during the criminal trial that dealt with the crime that gave cause for the start of the mediation. Furthermore, the current type of victim-offender mediation can still result in civil litigation, for example, if the issue of financial compensation has not been addressed by the criminal court or in mediation.

If a mediation following conviction and sentencing is ended due to offender behaviour concerning other crimes, this may have drawbacks for the victim and violate the essentials of the mediation process. Furthermore, failure of this type of mediation implies that the victim has fewer opportunities to be heard; since the criminal trial that deals with the central crime has been concluded, all that remains for the victim is to take the case to civil court. The victim should therefore not be denied the opportunity to take part in victim-offender mediation at this stage. Because of this, and due to the harmful consequences of the offender's behaviour concerning other crimes for the victim and the mediation process, the mediation essentials do not obstruct making an exception to the principle of confidentiality here.

Secondly, the admissibility of such information as evidence in court should be assessed. Since the judicial proceedings that can follow the current type of mediation are of a civil nature (apart from the possibility that a new criminal trial is started, see above), only the features of civil law, and the civil limitations on gathering and using relevant information, should be taken into account here. They do not prejudice the permissibility of the information concerned, for the reasons mentioned above regarding the other types of victim-offender mediation. This implies that committing another crime during mediation or disclosing information about other crimes during mediation, can be adduced as evidence in civil litigation that followed a mediation that took place after the conviction and sentencing of the offender.

6.2.5 Résumé

Victims and offenders should take part in victim-offender mediation on an informed and voluntary basis; they must be aware of the implications of their participation prior to the mediation. A decision to participate means that the parties are conscious of their own role within the process and of the position of the other party, and that they intend to contribute to the success of the procedure. Victim-offender mediation is also facilitated by a confidential environment, which enables a free exchange of information between the victim and the offender. However, situations may arise that damage the relationship between the victim and the offender in such a way that it is impossible to continue the mediation. Consequently, the process is terminated. Such situations can be caused by behaviour of the offender. The most striking example is that of the offender committing another crime against the same victim during mediation or revealing information about other crimes during mediation. The question how to respond to such cases has been the central focus of this section.

The harm caused by offender behaviour can be remedied by allowing the disclosure of the information concerned. Since this implies an exception to the principle of confidentiality, what should first be considered is whether making such an exception is consistent with the main essentials of victim-offender mediation. Secondly, it should be established whether the information concerned can be used as evidence in criminal and civil court. To answer this question, the compatibility with the main features of criminal and civil law must be assessed. Thirdly, it should be regarded whether existing limitations on gathering and using relevant information in criminal and civil law give reason to keep the information concerned out of court.

These questions have been examined for each of the three types of victim-offender mediation, the conclusion being that the information regarding additional crimes can be disclosed by the mediation participants in spite of the principle of confidentiality. Furthermore, the information can be used as evidence in subsequent criminal or civil proceedings. For the third modality of victim-offender mediation, information can only be adduced as evidence in civil litigation, since the offender has been convicted at the start of the mediation.

6.3 Confessional Statements by the Offender

6.3.1 Overview

Victim-offender mediation aims at dealing with a crime that has taken place and its aftermath. During mediation, the victim and the offender discuss their needs and feelings pertaining to the crime, explain how it has affected them, and try to reach some form of understanding. Consequently, the

primary focus of mediation is not on the exchange of legally relevant information. Nevertheless, it is highly probable that the question of the offender's guilt, or of his acknowledgement of having committed the crime, will be addressed. Offenders may, for example, explain their motives in the course of the dialogue with their victims. Such utterances may constitute statements that can be considered a confession. This section discusses the level of confidentiality that should apply to confessional statements made in the context of mediation.

According to international regulations, it is currently not a precondition for mediation that offenders confess to having committed the crime for which they have been referred to mediation.[400] The Council of Europe Recommendation and the United Nations Basic Principles both state that it will suffice if the victim and the offender acknowledge the basic facts of a case prior to the mediation.[401] Acknowledging basic facts separates the criminal event(s) from the notion of legal guilt; the presumption of innocence is not violated, and parties can reach the general agreement on the facts that is required for mediation to function properly.[402] The participation of offenders in mediation and their acknowledgement of the basic facts should therefore not be used as evidence of admission of guilt in subsequent legal proceedings.[403] The *presumptio innocentiae* requires that the court must not be biased against offenders because they have agreed to participate in mediation.[404]

However, the distinction between the acknowledgement of basic facts and an admission of guilt may come across as artificial in practice. Realistically, the offender's acknowledgement of basic facts often implies an admission that he has committed the crime concerned. Victim-offender mediation presupposes that the victim and the offender have been identified, and mostly deals with relatively simple offences, such as robbery or theft. An acknowledgement of the basic facts (e.g., that the offender appropriated the victim's handbag) then often amounts to an admission of the offender that he has committed the crime (of, in the above example, robbery).

In addition, victim-offender mediation focuses on enabling victims to express their needs and feelings, and on offenders to accept and act on their responsibilities.[405] It seems impossible for offenders to accept responsibility

400 Although some domestic mediation programmes do require this, for example, Austria, Denmark, Poland, and Slovenia. See also K. Lauwaert, *Herstelrecht en procedurele waarborgen*, Antwerp/Apeldoorn: Maklu 2008, pp. 98ff.; and Chapter 3.2.1.

401 Paragraph 14 of the Recommendation and Paragraph 8 of the Basic Principles.

402 Explanatory Memorandum to the Recommendation, p. 28; and Van Ness 2003, pp. 168-169. See also Lauwaert 2008, p. 100.

403 The second part of Paragraph 14 of the Recommendation and Paragraph 8 of the Basic Principles.

404 Explanatory Memorandum to the Recommendation, p. 28; Van Ness 2003, pp. 168-169; and United Nations Office on Drugs and Crime 2006, p. 34.

405 M. Schiff, 'Satisfying the Needs and Interests of Stakeholders', in: G. Johnstone & D. van Ness (eds.), *Handbook of Restorative Justice*, Cullompton: Willan Publishing 2007, p. 231.

without at least acknowledging that they have contributed to the occurrence of the crime.[406] After all, taking and acting on responsibility without admitting to *being* responsible seems impossible. When offenders acknowledge the basic facts at the start of a mediation, they also implicitly recognise their responsibility *for these facts*. In other words, the participation of offenders in mediation entails that they admit to having contributed to the occurrence of the basic facts. Furthermore, offenders who truly believe that they are innocent are unlikely to agree to take part in victim-offender mediation. Nor indeed should they.[407] After all, it is improbable that they will be able and willing to properly acknowledge the victim and provide compensation. In such cases, an offender's interest would be better served by his appearing in court and requesting to be acquitted. This state of affairs detracts from the ability of offenders who believe that they are innocent or not responsible for the offence charged to participate in mediation in a meaningful way. It therefore seems unadvisable to confront victims in a victim-offender mediation with offenders who are unwilling to accept responsibility for what has happened.[408]

Although the recognition of the basic facts in many cases implies an admission of guilt, it remains conceivable that this is not the case; for example, if a rape victim meets the offender, they may agree on the basic fact that there was sexual intercourse, but disagree on the question whether this happened against the will of the victim. In such a case, acknowledging basic facts is not the same as confessing to a crime.[409] This may, in fact, be a topic for the parties to discuss in mediation, and the offender may admit during these discussions that he was aware of the victim's resistance, thereby effectively confessing having sexually assaulted the victim against the latter's will.

A confession made by the offender during mediation may have evidential value in judicial proceedings following a mediation. Due to their procedural position in such proceedings, offenders are allowed to withdraw confessions made in the context of mediation afterwards. Offenders have a right to be heard and to make a statement in court. This statement can contradict previously made confessional statements. The offender's position is similar to that of a suspect during a police interrogation; statements made during

406 See also J. Braithwaite & S. Mugford, 'Conditions of Successful Reintegration Ceremonies: Dealing with Juvenile Offenders', *British Journal of Criminology* 1994-2, p. 146.

407 This also follows from the assumption that offenders participate in victim-offender mediation because they want to take direct responsibility for their actions (M.S. Umbreit, R.B. Coates & B. Vos, 'Victim-Offender Mediation: Three Decades of Practice and Research', *Conflict Resolution Quarterly* 2004-1/2, p. 286).

408 To circumvent these issues, some national mediation programmes require that offenders admit that they have committed the offence charged, or that sufficient evidence to charge them is available.

409 However, it remains questionable whether rape victims should be confronted with offenders who are unwilling to admit that they assaulted the victim.

such interrogations can also be withdrawn afterwards. However, an important difference with the withdrawal of a statement made to the police is that the court is able to take cognizance of the withdrawn police statement. It can still be used as evidence; in such instances, it is up to the court to assess how both statements should be weighed, taking into account both the offender's statement in court and the earlier statement included in the paper file of the case.

However, according to the current interpretation of the principle of confidentiality, all matters that are discussed in mediation should in principle remain secret. Consequently, the court is unable to take a previous confession, made in the context of mediation, into consideration and compare it to the new statement entailing a withdrawal. This also follows from the Explanatory Memorandum to the Recommendation, which states that a confession of guilt by the accused in the context of mediation should not be used as evidence in subsequent criminal proceedings on the same matter.[410] If the intended scope of the confidentiality rule were to be honoured, victims would consequently be unable to tell the court that the offender confessed to having committed the crime during the mediation that preceded the judicial proceedings.[411] This may understandably not be to the victim's advantage.[412]

Victim-offender mediation focuses on restoring the criminal harm that has been done to the victim. The victim's participation in mediation should therefore not add to his or her distress.[413] The interpretation of the required acknowledgement of basic facts and other confessional statements may cause such additional grief. The advocated extent of the principle of confidentiality implies that the victim is unable to tell the court that the offender confessed to having committed the crime during mediation. Also, during mediation a victim can be confronted with an offender who does recognise the facts of a case, but is not ready to take responsibility for what has happened (see the earlier example of rape).[414] Furthermore, the distinction between the acknowledgement of facts and the acceptance of guilt can be incomprehensible to victims – they may not fully understand the mediation process, considering that they are generally lay persons in legal affairs. Victims may be unable to understand how an offender can

410 Explanatory Memorandum to the Recommendation, p. 28.

411 The same situation occurs if the offender exercises the right to remain silent during a criminal trial and thus refuses to repeat the confessional statement concerned, since none of the other mediation participants will then be able to disclose the offender's statements from the mediation.

412 Since an insincere apology has been found to cause secondary victimisation, the withdrawal of a confession may have a similar effect.

413 In all restorative processes, it is important that re-victimisation does not occur (United Nations Office on Drugs and Crime 2006, p. 59).

414 Empirical studies show that victims take part in mediation to hold the offender accountable and to share their pain with the offender (Umbreit, Coates & Vos 2004, p. 286). Especially the first motive for victim participation will be endangered if an offender is unwilling to bear responsibility.

participate in mediation and try to make amends, without being willing to bear responsibility for what has happened afterwards in court. Their limited comprehension may cause victims to feel frustrated and distressed,[415] especially if they are also unable to tell the court about the offender's confession in mediation.

Given these considerations, are statements of the offender made in the context of victim-offender mediation and constituting a confession justifiably subject to confidentiality, or should it be possible to disclose them in court after the mediation has ended?

6.3.2 Victim-Offender Mediation as a Diversionary Measure

Referring a case to diversionary mediation is generally considered to serve the interests of the victim and the offender best. The mediation enables victims to talk about their experiences pertaining to the crime, while their opportunities to do so during regular proceedings are limited. Furthermore, the offender will no longer be prosecuted if the mediation ends successfully. The benefits of mediation for both the victim and the offender urge that their possibilities to fruitfully participate in the procedure must not be endangered without good cause. A lack of understanding of the procedure, feelings of secondary victimisation, or other incidents that could add to the distress or frustrate the procedure should therefore be avoided.

In the case of diversionary mediation, a failed mediation process will lead to the continuation of the criminal trial. Confessional statements of the offender made during the mediation can then become relevant in the light of the criminal justice process, since they may affect the provability of the charge against the offender. For example, if the offender in mediation confessed to breaking into the victim's house, this statement could be relevant to the assessment of the offender's guilt of burglary. If the offender withdraws such a confession or invokes the right to remain silent, the court would be unable to consider the statements concerned in view of the advocated interpretation of the principle of confidentiality. This situation may not be beneficial to the victim. Formulating an exception to the confidentiality rule, allowing the disclosure of mediation information concerning confessions, could be a remedy for the harm and distress that may be caused by the offender's withdrawal of a confession.[416] This may

415 Victims' lack of understanding of the mediation process (or aspects of it) should be avoided whenever possible, especially considering that a general lack of understanding is regarded by mediators as one of the primary reasons for a refusal to participate in mediation (D. Ruth-Heffelbower & J. Montanez, 'Victim Offender Mediation Refusals: A Study of Mediator Perceptions', 2005, pp. 13-14, <http://peace.fresno.edu/docs/VORP%20refusals.pdf>).

416 Victims would then be enabled to bring the confessional statements of the offender to the attention of the court, and are thus empowered to take action against the offender's withdrawal of a confession after a mediation.

also make the mediation procedure more comprehensible and transparent to its lay participants. In the example mentioned above, the victim could then disclose to the court that the offender admitted burgling the victim's house, even if the offender withdrew this confession after the mediation; the victim would no longer feel frustrated by the court being unable to take notice of this confession.

Making an exception to the confidentiality rule must be compatible with the fundamentals of victim-offender mediation and with the essentials of criminal and civil law to enable the use of the information concerned in court. The existing limitations on the use of relevant information in criminal and civil law should also be taken into account.

Before the start of a victim-offender mediation, victims and offenders are required to acknowledge the basic facts of a case. As described above, in many cases this boils down to offenders confessing to having committed the crime charged. There are no procedural rules that oppose the withdrawal of statements to that effect by the offender (see above). However, such a withdrawal seems inconsistent with the idea behind mediation, since the basic-facts requirement is a *conditio sine qua non* for the start of a victim-offender mediation and an essential element of the offender's acceptance of responsibility. The same is true if the basic-facts recognition in itself does not constitute an admission of guilt, but the offender makes a confession in the course of the mediation (see the example of rape above). A withdrawal of such a confession is also at odds with shouldering responsibility, another necessary element of victim-offender mediation. It conflicts with the idea behind mediation itself; it seems impossible for an offender to truthfully apologise to the victim, or to assent to, for example, the performance of community service as part of the mediation agreement, without accepting responsibility for what has happened, and thus recognising a measure of guilt. As a result, a victim may understandably suffer adverse effects of a previous confession being retracted.

An aspect that reinforces the inconsistency of withdrawing a confession made in the context of mediation with the fundamentals of mediation is the voluntary nature of the parties' participation. Participating offenders have consciously decided to take part – and thus voluntarily acknowledged the basic facts – and have consequently committed to contribute to reach an agreement with the victim. Accepting a degree of guilt is a necessary element of this. Denying of this acceptance of guilt or responsibility later on is therefore also incompatible with the voluntariness standard; if offenders are unwilling to acknowledge the basic facts or admit guilt, they should rather refrain from taking part or opt out.

The above holds especially true in view of the requirement that victims and offenders receive sufficient information about the implications of engaging in mediation. This implies that they know what is expected of

them during the mediation and what their respective roles are.[417] Offenders should realise before they make the decision to participate that they will be expected to take responsibility – which implies ad least a partial admission of guilt – during the mediation process. They should also acknowledge the victim's fragile and vulnerable position. Since a withdrawal of confessional statements may likely harm the victim, this cannot be regarded as consistent with the mediation requirement regarding information, and as a result, it does not stand in the way of making an exception to the principle of confidentiality.

In sum, the above-mentioned mediation requirements do not resist allowing disclosure of confessions made by the offender in the context of mediation; since subsequent withdrawal of such statements can generally be considered to violate these requirements, allowing disclosure may, in fact, offer a remedy for the injurious impact of retraction on the victim.

Next, the effectiveness of the remedy of making an exception to the confidentiality rule depends on the admissibility of such information in court. The disclosure of mediation information in court must therefore not violate the right to fair proceedings of the parties involved.

In Chapter Four (Section 3), various fair-trial requirements that apply to criminal law were discussed. The participation of an offender in mediation must not be regarded as evidence of guilt during subsequent proceedings,[418] since the *presumptio innocentiae* requires that the guilt of the accused be established on the basis of lawful evidence, and that the court not be prejudiced against the issue of the defendant's guilt prior to the proceedings. The offender's consent to participate in mediation should therefore not be regarded as an admission of guilt, and the acknowledgement of basic facts or a confession made in the course of mediation is not indisputable; the offender should be allowed to withdraw confessional statements made in mediation after the process has been concluded.[419] This also follows from the essential focus of criminal law on the fact-finding process and the clarification of what has happened; as much relevant information as possible should be brought to the attention of the court (including the withdrawal of

417 Schiff 2007, p. 231.

418 Explanatory Memorandum to the Recommendation, p. 28.

419 If the offender's consent to take part in victim-offender mediation (implying their acknowledgement of basic facts) were to be considered a waiver of the right to be presumed innocent, it would be impossible for offenders to withdraw such statements afterwards, and these would be indisputable in subsequent judicial proceedings. However, Lauwaert has rightly observed that it is impossible for offenders to waive the *presumptio innocentiae* (Lauwaert 2008, pp. 107ff.). It should be considered 'an established part of the rule of law', and consequently cannot be waived, since this would 'erode the substance of the legal order that guarantees third parties' rights' (S. Rixen, 'Victim-Related Mediation Procedure 'Without Prejudice to the Rights of Offenders': Realizable?', *Panopticon* 1993-1, p. 54. On this topic in general, see also pp. 53-55.). As a result, mediation participation of offenders cannot lead to conclusions regarding the question of legal guilt.

a previous statement by the alleged offender). The fact that the criminal law essentials allow offenders to withdraw previous confessions, however, does not imply that these essentials oppose the disclosure of confessions by other mediation participants. Since such withdrawals may violate mediation essentials and disadvantage the victim (see above), allowing the victim to disclose the offender's confessions made in mediation may be a remedy. As long as the procedural requirements that follow from the right to adversarial proceedings are met, the features of criminal law do not oppose adducing such information. If the offender persists in his or her withdrawal, it is up to the court to establish the truth.

If the victim and the offender become involved in civil litigation after a diversionary mediation, for example, regarding a claim for financial compensation if the mediation has failed or if the criminal court has not addressed this issue, the use of confessional statements can also be relevant to substantiate such a claim. For this information to be admissible in court, it must not violate the main characteristics of civil law. These characteristics do not oppose the disclosure of the basic facts or the confessional statements in court, as long as the necessary procedural requirements are observed.

The admissibility of mediation information in criminal and civil court can, however, be invalidated by the existing limitations on gathering and using relevant information in criminal and civil law.

For reasons mentioned in Chapter 6.2.2, these limitations do not ban confessional information from court. The limitation regarding the restricted use of coercive powers in criminal law does not apply, since the information concerned has not been gathered using such powers. The exclusionary rule is irrelevant because the confessional statements that can be disclosed have not been obtained illegally. The same goes for the other criminal and civil law limitations, since they concern the *ability* of individuals to submit information in court, instead of the *type* of information that can be adduced, which is what is discussed in this chapter.

As a result, the limitations on gathering and using relevant information in criminal and civil law do not oppose making an exception to the principle of confidentiality in the current context.

In conclusion, the acknowledgement of basic facts and confessional statements by the offender are both admissible as evidence in criminal or civil proceedings following a diversionary mediation, as long as the necessary procedural requirements are met.[420] The offender remains free to withdraw such statements after the mediation has ended. However, the other mediation participants should be allowed to disclose this information

420 The confessions concerned pertain to the crime the mediation focuses on. If the offender confesses other crimes during a mediation, these statements should also be open for disclosure, as they can be categorised under the exception pertaining to other crimes (see Section 6.2).

in court to remedy the harmful effects of the offender's withdrawal.

6.3.3 Victim-Offender Mediation as Part of Regular Court Proceedings

Victim-offender mediation that is used as part of the regular court proceedings will in all cases be followed by a criminal trial. The result of the mediation can then be taken into account by the criminal court. Victims have considerably fewer opportunities to express themselves during court proceedings; it is therefore important that their participation in mediation is ensured as fully as possible. Considering that victim-offender mediation has real benefits for the victim and the offender, the parties should not be denied the opportunity to take part. This also means that their involvement in mediation does not add grief. Especially victims should not be confronted with new negative experiences that exacerbate their crime induced anxieties.[421] Such drawbacks may, for example, result from their incomprehension of the mediation process caused by the offender withdrawing a confession after the mediation has been concluded (see above). According to the advocated extent of the principle of confidentiality, victims would be unable to report such issues. These considerations are of special relevance here, because the current type of mediation will, as a rule, be followed by a criminal trial. The question of the offender's guilt will be a significant aspect of these proceedings, and confessional statements can understandably play a role in answering this question. Negative effects of the victim being unable to disclose such issues will be inevitable, since the current type of mediation is bound to be followed by criminal proceedings. Should an exception be made to the current interpretation of the confidentiality rule in order to remedy the drawbacks of the secret nature of confessions in mediation? Whether making such an exception is compatible with the fundamental features of mediation itself will be examined below. What will also be discussed is whether information which originates from a mediation that is part of regular court proceedings, can be used as evidence in subsequent legal proceedings.

As said before, the main mediation requirements concern the acknowledgement of basic facts, the voluntary nature of the parties' participation, and their being sufficiently informed prior to the mediation. The discussion of these features regarding diversionary mediation *mutatis mutandis* also applies here. The fact that offenders make a free and informed decision to participate in victim-offender mediation and acknowledge the basic facts of a case prior to mediation implies that they consciously agree to bear responsibility for what has happened, and to treat victims accordingly. Due to the nature of the cases that qualify for mediation, the basic-facts recognition will in many cases include a confession; if not, it is likely that the

421 United Nations Office on Drugs and Crime 2006, p. 59.

offender confesses to having committed the crime as part of the dialogue between the parties. In this way, offenders show that they are willing to take responsibility for what they have done to the victim and the harm they have caused. Consequently, not only is it inconsistent with these mediation fundamentals for offenders to withdraw confessional statements afterwards (although they are allowed to do so), such withdrawals may also disadvantage victims. The main mediation requirements therefore do not oppose making an exception to the advocated extent of the principle of confidentiality.

The admissibility of confessional information in criminal and civil court – and thus the 'effectiveness' of allowing the mediation participants to disclose this information – depends on the compatibility of making an exception with the essential features of criminal and civil law.

For reasons mentioned above, criminal law fundamentals enable offenders to recant previously made statements. This goes for statements made during a police interrogation, and also for those made in mediation. However, the features of criminal law do not resist the disclosure of such information later on in court by others; as the court also takes notice of an earlier confession made by the police, there is no rule of criminal law that bars the court from taking a confessional statement made in mediation into consideration. As a result, confessional statements originating from mediation can be submitted as evidence by the other mediation participants (in accordance with usual procedural requirements).

Confessional statements made during a victim-offender mediation that is used as part of regular court proceedings can also be presented in civil litigation, on condition that the required procedural rules are followed. It should be noted, however, that it is unlikely that this type of victim-offender mediation is followed by civil proceedings, since there will always be a criminal trial. Civil proceedings will often focus on financial compensation, which is an issue that may also be addressed by the criminal court and during the mediation itself. Nevertheless, if, for example, the parties have not reached agreement on this topic during mediation, or the criminal court considers the claim for damages too complicated, the victim may need to go to civil court to obtain compensation.

Information about confessional statements can be classified as belonging to the relevant facts and circumstances the court can take into account in legal proceedings. If the existing limitations on the gathering and use of these facts and circumstances apply here, they may be an impediment to making an exception to the confidentiality rule.

The existing limitations in criminal law are the restricted exertion of coercive powers, the privilege to refuse to testify and the exclusionary rule. These limitations do not apply here, for the same reasons that were mentioned above pertaining to diversionary mediation. This also goes for

the civil-law limitations (privilege to refuse to testify, restricted conclusive force of party-witness statements, and the exclusionary rule).

The restrictions to the use of relevant facts and circumstances therefore do not oppose the use of information from confessional statements as evidence in court.

In conclusion, the offender's acknowledgement of basic facts prior to mediation or his confession during mediation of having committed the crime should also be admissible in criminal or civil proceedings if the preceding mediation was part of regular court proceedings.

6.3.4 Victim-Offender Mediation after Conviction and Sentencing

The third modality of victim-offender mediation is when the offender has been convicted and sentenced. This type of mediation is not followed by a criminal trial; the offender has already been found guilty by the court, and has been sentenced accordingly before the start of the mediation. Nevertheless, if the issue of financial compensation has not been resolved in mediation or in criminal proceedings, a civil action can be brought after the mediation has ended, and information from the mediation may then be relevant. In this context, the information would pertain to the offender's guilt, namely the acknowledgement of the basic facts, or confessional statements made in the course of the mediation.

The conviction of the offender before the start of the mediation implies that the question of guilt has already been answered. Disclosure of the offender's confession during mediation would only confirm the criminal court's finding. Observing confidentiality would seem meaningless. Nevertheless, it can also be argued that the offender's conviction renders the disclosure of confessional statements made in mediation futile: confidentiality could be adhered to in order to motivate offenders to participate. However, an exception for confessional statements is unlikely to prevent offenders from taking part in the current type of mediation, since the offender's guilt has already been established in open court. As making an exception to the confidentiality rule is therefore unlikely to cause problems, and since accepting this exception for this type of mediation would provide a uniform regulation applying to all modalities of victim-offender mediation, confessions made in the context of mediation should also be open to disclosure in civil court if the mediation follows the conviction and sentencing of the offender. Additionally, this does justice to the general feature of civil law that parties in civil proceedings are essentially free to substantiate their claims as they see fit. The victim and the other mediation participants should therefore be allowed to furnish confessional mediation information in civil proceedings. Naturally, the requirements that follow from the right to adversarial proceedings should be observed.

6.3.5 Résumé

The principle of confidentiality as it is currently interpreted generally applies to everything that is said and done during a victim-offender mediation. This means that confessional statements, either resulting from the acknowledgement of basic facts or from further communication during the mediation session(s), should remain secret. In addition, the acknowledgement of basic facts at the start of a mediation must not be used in evidence in court – the acknowledgement is disconnected from the recognition of guilt. This state of affairs can cause problems in practice. The distinction between the acknowledgement of basic facts and the recognition of guilt may be beyond the victim's understanding. In addition, the victim may experience frustration or distress at being unable to report confessions made by the offender in the course of mediation, especially since the offenders are able to withdraw such statements after the mediation has ended.

The acknowledgement of basic facts often constitutes a confession. If this is not the case, the offender is likely to confess during the mediation to having committed the crime; after all, admitting some degree of guilt is a necessary element of accepting responsibility, which is essential to victim-offender mediation. A withdrawal of confessional statements is therefore not consistent with the main mediation requirements; consequently, these requirements do not exclude making an exception to the principle of confidentiality for such statements. Such an exception is also consistent with the features of criminal and civil law, and the information concerned is admissible in criminal or civil court. The existing limitations on gathering and using legally relevant information do not apply.

As a result, confessional statements made by the offender, either resulting from the acknowledgement of basic facts or from the communication in mediation, can be disclosed and adduced as evidence in judicial proceedings (regarding the third modality of victim-offender mediation, in civil proceedings only, since the offender has already been convicted and sentenced by the criminal court prior to mediation).

6.4 Conclusion

This chapter has discussed two areas of conflict regarding the principle of confidentiality, both pertaining to the offender. The first one concerns committing another crime or divulging information about other crimes during the mediation. The second one relates to confessional statements made in the context of mediation. According to the current interpretation of the principle of confidentiality, all information of these two kinds should remain secret. However, the current scope of the confidentiality rule is likely to cause problems, especially for the victim. Therefore, for both situations

the question has been whether these drawbacks justify an exception to the principle of confidentiality, allowing the victim and the other mediation participants to disclose the information concerned and remedy the harm caused by these problems. To assess the viability of making an exception two questions have been addressed: is making an exception compatible with mediation fundamentals, and is the information concerned admissible as evidence in court?

The conclusion is that exceptions to the confidentiality rule can (and should) be made for both areas of conflict. Behaviour of the offender concerning other crimes and confessional statements made in the context of mediation should be open to disclosure and used as evidence in subsequent criminal or civil proceedings.

7 Outcome-Related Issues: Implementation Failure

7.1 Introduction

A successful victim-offender mediation will in most cases result in a mediation agreement laying down the conditions for the offender to fulfil in order to compensate the victim for the harm caused by the crime. These conditions may be duties the offender has to perform after the conclusion of the mediation, or obligations he met during the mediation (for example, an apology during the mediation). The fulfilment of the mediation agreement can be considered the offender's ultimate acknowledgement of responsibility for the crime, and of his resulting duty to compensate the victim. Compliance with the agreement is a crucial success factor for mediation,[422] and a failed implementation of the agreement may cause the victim to feel frustrated, deceived, and disillusioned. If the failure follows from the communication in mediation, the current interpretation of the principle of confidentiality requires that the reasons for the failure remain secret. However, the drawbacks for the victim that result from an implementation failure are grounds for reassessing the level of confidentiality that should apply. This chapter will discuss the appropriate scope of the principle of confidentiality in the context of implementation failures. Following an overview, this issue will be examined in the light of the three mediation modalities, and the main findings will be summarised in the conclusion.

7.2 Overview

During a victim-offender mediation, the victim and the offender can mutually express their needs and feelings. As part of this exchange, the victim may indicate how the offender can compensate the material and immaterial damage he or she suffered. If the offender is willing to make amends, the parties can lay down their arrangements in the mediation agreement.

The parties are free to include all sorts of commitments in the agreement. The Council of Europe Recommendation and the United States Basic Principles only require that the agreement is reached voluntarily, and that it contains reasonable and proportional obligations.[423] The required voluntariness of the agreement follows from the mediation standard

422 United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes*, New York: United Nations 2006, p. 61.

423 Paragraph 31 of the Recommendation and Paragraph 7 of the Basic Principles.

concerning the parties' voluntary participation.[424] Since the voluntary nature of the participation of the victim and the offender implies that they can withdraw from the mediation at any time, they should also be able to do so at the time of the agreement being concluded. Their consent to the agreement should consequently be free given of pressure. The voluntary nature of reaching an agreement distinguishes mediation from processes that impose obligations, such as judicial proceedings, or alternative procedures such as arbitration.[425] Such processes usually culminate in a decision that coerces a party to fulfil a particular duty, or that inflicts a punishment – the consent of the party concerned is not required.

The required reasonableness and proportionality of the mediation agreement also point at some relationship between the offence and the type of obligation that the offender has to fulfil.[426] The burden imposed on the offender and the seriousness of the offence should correspond.[427] For example, the mediation agreement should not oblige the offender to pay excessive damages. In addition to these general requirements, parties are at liberty to include different types of conditions in the agreement in order to allow for the multiplicity of consequences that victims may experience as a result of the crime.[428] A common condition in the agreement is the payment of restitution or compensation,[429] but a verbal or written apology, the performance of community service, or promises about future behaviour and contact are not uncommon either.[430]

In the previous chapters, it was explained that during the mediation offenders should accept and act on their responsibilities. This also follows from the offender entering into an agreement with the victim. The fulfilment of the conditions laid down in the agreement demonstrates the offenders'

424 D. van Ness, 'Proposed Basic Principles on the Use of Restorative Justice: Recognizing the Aims and Limits of Restorative Justice', in: A. von Hirsch *et al*. (eds.), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?*, Oxford: Hart 2003, p. 168.

425 Explanatory Memorandum to the Recommendation, p. 33; and Van Ness 2003, p. 168.

426 Explanatory Memorandum to the Recommendation p. 33; and Van Ness 2003, p. 168.

427 Explanatory Memorandum to the Recommendation p. 33; and Van Ness 2003, p. 168. The nature of victim-offender mediation brings along that the main relationship in this respect is that between the damage suffered by the victim and the compensation provided by the offender. The obligations in the mediation agreement should not be excessive in proportion to the material and immaterial harm caused. (K. Lauwaert, *Herstelrecht en procedurele waarborgen*, Apeldoorn/Antwerp: Maklu 2008, pp. 182ff.).

428 I. Aertsen, *Slachtoffer-daderbemiddeling. Een onderzoek naar de ontwikkeling van een herstelgerichte strafrechtsbedeling*, Leuven: Universitaire Pers Leuven 2004, pp. 127ff.; and Lauwaert 2008, pp. 189-190.

429 For example, more than 90 percent of the mediated cases in the United States and Canada resulted in restitution agreements (M.S. Umbreit, R.B. Coates & A.W. Roberts, 'The Impact of Victim-Offender Mediation: A Cross-National Perspective', *Mediation Quarterly* 2000-3, p. 224).

430 United Nations Office on Drugs and Crime 2006, p. 43; and J. Blad, 'De betekenis van de overeenkomst', *Tijdschrift voor Herstelrecht* 2007-2, p. 11.

ultimate willingness to make amends. By fulfilling these conditions, the offender both recognises the victim and the harm the victim suffered at his hands and he acknowledges his accountability. Generally, offenders tend to fulfil the obligations that result from mediation agreements. Studies indicate that the compliance rate of offenders who participate in restorative programmes is substantially higher than that of offenders exposed to other arrangements.[431] The offender's fulfilment of the agreement contributes to the victim's achievement of closure. For example, the payment of compensation by the offender can convince the victim that the offender accepts responsibility for the damage caused. Moreover, the victim can experience a sincere apology from the offender as a recognition of the harm caused.[432]

The offender's compliance with the mediation agreement has a positive effect on the victim's wellbeing. However, the opposite is also true. A failed implementation of the agreement can cause the victim to feel frustrated and distressed, and can even lead to secondary victimisation.[433] Apologies that the victim regards as insincere tend to impede the victim's ability to forgive the offender[434] and may worsen the trauma of secondary victimisation.[435]

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431 Up to 81 percent of the offenders that participated in mediation, against 58 percent of those that were ordered to pay restitution by the court (M.S. Umbreit, R.B. Coates & B. Vos, 'Victim-Offender Mediation: Three Decades of Practice and Research', *Conflict Resolution Quarterly* 2004-1/2, pp. 290-291; and Umbreit, Coates & Roberts 2000, p. 225). Similar percentages resulted from a study into restitution compliance in restorative practices in the Netherlands (Blad 2007, p. 11; and Y.M. Hokwerda, *Herstelrecht in jeugdstrafzaken*, The Hague: Boom Juridische uitgevers 2004, p. 176). See also J. Latimer, C. Dowden & D. Muise, 'The Effectiveness of Restorative Justice Practices: A Meta-Analysis', *The Prison Journal* 2005-2, p. 137.

432 C.D. Schneider, 'What It Means to Be Sorry. The Power of Apology in Mediation', *Mediation Quarterly* 2000-3, pp. 265 and 269. The acceptance of responsibility by the offender is generally considered a central element of an effective apology (C.J. Petrucci, 'Apology in the Criminal Justice Setting: Evidence for Including Apology as an Additional Component in the Legal System', *Behavioral Science and the Law* 2002, pp. 349ff.). Receiving an apology from the offender may also contribute to the victim's ability to forgive the offender (M.E. McCullough, E.L. Worthington & K.C. Rachal, 'Interpersonal Forgiving in Close Relationships', *Journal of Personality and Social Psychology* 1997-2, pp. 321 and 332ff.).

433 The United Nations *Handbook on Restorative Justice Programmes* points out that victims may be concerned about the lack of consequences imposed on offenders who fail to live up to their commitment or terms in the agreement, and that they may be pressured into failing to reveal that the offender has not complied with the negotiated agreement (United Nations Office on Drugs and Crime 2006, p. 68).

434 R.F. Baumeister, J.J. Exline & K.L. Sommer, 'The Victim Role, Grudge Theory, and Two Dimensions of Forgiveness', in: A.L. Worthington (ed.), *Dimensions of Forgiveness*, Philadelphia: Templeton 1998, pp. 100ff.

435 A. Pemberton, F.W. Winkel & M.S. Groenhuijsen, 'Op weg naar slachtoffergerichte theorievorming in het herstelrecht', *Tijdschrift voor Herstelrecht* 2006-1, p. 57; A. Opdebeeck, G. Vervaeke & F.W. Winkel, 'Bemiddeling in het strafrecht', in: P.J. van Koppen *et al.* (eds.), *Het Recht van Binnen*, Deventer: Kluwer 2002, pp. 941-942; and R.A. Baron, 'Attributions and Organizational Conflict: The Mediating Role of Apparent Sincerity', *Organizational Behavior and Human Decision Processes* 1988-1, pp. 125ff.

Failure to implement a mediation agreement can lead to the resumption or continuation of the criminal justice process, depending on the type of victim-offender mediation that preceded the criminal trial (diversionary mediation or mediation as part of regular court proceedings). If the reasons behind the implementation failure trace back to the communication in mediation, the principle of confidentiality as currently interpreted applies: the reasons for the failure should be subject to secrecy and should not be disclosed. Furthermore, the United Nations Basic Principles state that a failure to implement a mediation agreement should not be used as a justification for a more severe sentence in subsequent criminal proceedings.[436] The case should be referred back to the restorative programme or to the criminal justice process,[437] and a decision as to how to proceed should be taken without delay. The principle of confidentiality is the main inspiration for this provision. However, if the offender deliberately refuses to comply with the agreement, it is questionable whether a restorative programme can repair the agreement or inspire a new agreement between the victim and the offender.

Implementation failures could only be used as aggravating circumstances by the court if the court finds fault with the offender in approaching the execution of the agreement. This may compel the court to examine how the agreement came about and what transpired in mediation.[438] Such an examination can violate mediation confidentiality. It has therefore been proposed to consider an implementation failure simply as an incentive to resume the criminal justice proceedings.[439] This would also avoid undue interference of the judicial system with restorative programmes.

The approach advocated by the Basic Principles seems to be acceptable if offenders cannot be blamed for the implementation failure. Some factors may make it impossible for them to fulfil their obligations. For example, offenders may loose their job and may consequently be unable to pay the agreed restitution. The offender may also have agreed to perform community service with an agency of the victim's choice, but the agency concerned later appears not to need or want the offender's services.[440] Although offenders should act carefully and proactively in such cases – they may offer their services to a similar organisation, preferably in consultation with the victim and/or the mediator – they should not be held accountable for implementation failures that are beyond their control. Such failures should indeed merely be considered an incentive to resume the criminal justice proceedings, and should not be used as a justification for a more severe sentence.[441]

436 Paragraph 17 of the Basic Principles.
437 'where required by national law', see Paragraph 17 of the Basic Principles.
438 See also Van Ness 2003, pp. 172-173.
439 Van Ness 2003, pp. 172-173.
440 See also Van Ness 2003, p. 172.
441 Cf. Chapter 6.2.3.

However, an implementation failure may also be caused by reprehensible behaviour of the offender. For example, offenders may refuse to pay damages as contractually agreed, or to write the victim the promised letter of apology. The approach to such failures advocated by the Basic Principles leaves the victim empty-handed. A failure to comply with the contractual obligations means that the victim will no longer be compensated because of reprehensible offender behaviour. Such behaviour may induce the court to impose a harsher punishment; the offender's informed and conscious decision to participate in mediation, combined with the freedom to withdraw without consequences, implies that an offender who chooses to participate in mediation and nevertheless frustrates the procedure itself or its completion may be facing a more severe sentence.[442] However, the current scope of application of the interpretation of the principle of confidentiality to all communication in mediation dictates that the reasons for the implementation failure cannot be disclosed afterwards. The court is therefore unable to establish fault on the offender's side for the failure of the agreement and to take the implementation failure into account in sentencing. Furthermore, the ban on disclosure means that victims are unable to express in court their distress and frustration at the failed agreement. As a result, victims may experience feelings of secondary victimisation (see above), and no longer gain from their participation in mediation.

The problems caused by adhering to the current interpretation of the principle of confidentiality give cause for reconsidering the level of confidentiality that should apply. This will be examined below for each of the three types of victim-offender mediation, focusing on agreement failures caused by reprehensible offender behaviour.

7.3 Victim-Offender Mediation as a Diversionary Measure

In the case of diversionary mediation, a failure of the process leads to the resumption of the criminal trial, and the impossibility to implement the mediation agreement implies that the case is referred back to the criminal justice officials. Even though the reasons behind the implementation failure should remain confidential given the current interpretation of the principle of confidentiality, they may be relevant to court proceedings. As has been explained, keeping these issues secret can have serious drawbacks for the victim. Furthermore, a failure to carry out the mediation agreement implies that the victim has no opportunities left to obtain material or immaterial compensation in an out-of-court procedure. Making an exception to the principle of confidentiality and allowing disclosure of information about an implementation failure could remedy these defects. It would, for example, enable the victim to bring to the attention of the court that the offender failed

442 See also Chapter Six.

to pay the instalments they agreed on during the mediation, or refused to stay away from the victim. Allowing disclosure of the intentional violation of these conditions would give the court the opportunity to take these issues into consideration.

Additionally, a failed implementation of a mediation agreement may also become the focus of civil litigation. This is most likely if the failed agreement included the payment of damages. If the offender fails to comply with the agreement and the victim decides to bring a civil action, the victim can base the claim on the offender's failure to perform the contract. To substantiate such a claim (by explaining the process of the realisation of the agreement), the victim may understandably need to present information from the mediation. If the duties in the agreement concern the payment of a small sum in compensation, or writing a letter of apology, it is unlikely that a failure will lead to civil litigation; the possible benefits for the victim would be outweighed by legal costs. The offender's failure to fulfil such obligations may, however, come to bear on criminal proceedings, and can be taken into account by the criminal court in determining the severity of the sentence (see above). The criminal court may also award damages, if the victim joins the proceedings as injured party.

For the information concerned to be legally admissible, disclosure must be compatible with the fundamentals of victim-offender mediation, and of criminal and civil law.

Compliance with the main mediation characteristics indicates that the victim and the offender commit to bringing the mediation to a favourable conclusion. They should be thoroughly informed prior to the mediation, and they can withdraw from the procedure at any time. The victim and the offender are aware of the consequences of their decision to take part, and they accept these implications willingly. In other words, the victim and the offender are devoted to reaching an agreement at the end of the mediation and to fulfilling the resulting conditions; compliance with the agreement is part of the parties' commitment to contribute to the success of mediation. This also follows from the acceptance of responsibility by the offender, which is mostly inherent in the acknowledgement of the basic facts. Taking responsibility extends to the fulfilment of the obligations in the agreement – the ultimate recognition of victims and their needs. A deliberate violation of these conditions implies a violation of the main mediation requirements, especially since offenders have the opportunity to withdraw from the mediation at any time, if they cannot reach an agreement with the victim. As a result, the mediation requirements do not stand in the way of making an exception to the principle of confidentiality, if the offender imputably fails to comply with the agreement; such an exception would rather serve to denounce the violation concerned. Besides, the principle of confidentiality should not somehow protect the offender against the revelation of culpable acts, especially since the failure of the agreement is disadvantageous to the

victim. Although disclosure of information about an implementation failure may constitute a serious violation of the principle of confidentiality – it may compel the court to investigate the background of the failure to establish the offender's fault – the breach of the mediation essentials and the consequences for the victim justify making an exception to this rule.[443]

Allowing disclosure of information about a failed implementation is therefore compatible with the main mediation characteristics. However, the possibilities for the court to investigate the responsibility of the offender for such a failure depend on the admissibility of this information in court.

The essential features of criminal and civil law identified in Chapter Four should be observed when submitting information in court in order to safeguard a correct and fair course of the proceedings.

One of the features of criminal law is its fact-finding focus. In most jurisdictions, the fact-finding process covers both the criminal event(s) and the personal circumstances of the accused. These personal circumstances can include post-delict behaviour, such as the willingness of alleged offenders to express remorse, or their fulfilment of the duties that result from the mediation agreement.[444] This will allow the criminal court to consider behaviour of the offender during and after the mediation and to draw conclusions. If the court holds the offender accountable for the failed agreement, it may decide to impose a harsher punishment to reflect the violation of the mediation itself and for the harm the failure caused to the victim.[445] The other essential features of criminal law do not preclude the use of information about an implementation failure as evidence in criminal court, but procedural requirements should be observed.

When victim-offender mediation is followed by civil proceedings on account of an implementation failure of the mediation agreement, relevant information can only be used to substantiate the plaintiff's claim (or the defendant's plea) if the essentials of civil law are observed. The use of the

443 An intermediate stage might be to refer the case back to the restorative programme concerned in the case of an implementation failure. An example of this practice can be found in Austria. If offenders fail to pay the agreed financial compensation, the mediator will contact the offender and inquire about the reasons for the failure to pay in order to find a solution. If the offender does not respond or remains unwilling to comply with the agreement, the case will be referred back to the prosecutor's office for continuation, and the mediator will inform the victim of the possibilities to claim compensation in criminal or civil proceedings.

444 Although the accused's personal circumstances are taken into consideration at different moments in common-law and civil-law countries, post-delict behaviour can be taken into account in many. See also Chapter 4.3.1.

445 The assumption being that the implementation failure occurs in time to be notified to the criminal court. However, the offender may fail to comply with the mediation agreement after the criminal trial has been concluded. For example, the offender may start to pay the instalments of the damages as agreed, but cease to do so after a few months. In such a case, the only way for the victim to enforce the observance of the agreement is through civil litigation.

information concerned does not violate these essentials, as long as the necessary procedural requirements are met.

It follows that the essentials of criminal and civil law do not prejudice for the evidential use in court of information about an intentional failure to implement a mediation agreement. This may be different if such information should be left out of the official deliberations due to criminal and civil law limitations on the use of relevant facts and circumstances.

The coercive powers put many investigative sources at the disposal of the criminal justice authorities. Their use is regulated and limited by law. However, these legal restraints do not resist the use of information that concerns an intentional violation of the mediation agreement by the offender. This information has not been obtained by the exertion of these powers, but stems from a procedure the offender voluntarily participated in. Consequently, this limitation does not apply here.

The same goes for the privilege to refuse to testify, both in criminal and in civil law, because this privilege concerns the issue *who* can disclose information and not, as in the current context, *what* information can be disclosed. This also holds for the civil law limitation of the restricted conclusive force of statements made by party witnesses. Nor does the exclusionary rule give cause to block exceptions to the principle of confidentiality for information about implementation failures.

As a result, the limitations on the use of relevant information in criminal and civil law do not close off the use of information about a failure to implement an agreement.

To conclude, when the implementation of an agreement that was reached in the course of diversionary mediation fails through the offender's fault, information about the realisation of this agreement can be disclosed in spite of the principle of confidentiality and can be used by the court in subsequent judicial proceedings.

7.4 Victim-Offender Mediation as Part of Regular Court Proceedings

If mediation is used as part of regular court proceedings, it will be followed by a criminal trial irrespective of its outcome. A failure of the mediation agreement will not determine whether the case goes to criminal court, but may only affect the severity of the sentence, whereas in the case of diversionary mediation, the failure of the agreement causes the case to be referred back to the criminal justice authorities.

In the current context, the offender's reprehensible refusal to comply with the agreement can influence the outcome of the ensuing criminal procedure. As explained, the criminal court can take post-delict behaviour into account when assessing a case, including offender behaviour during or after a

victim-offender mediation. If a mediation that is part of court proceedings is successfully concluded (including the fulfilment of the obligations that arise from the agreement), this may have a positive effect on the court's sentencing decision in a similar vein to, for example, an expression of regret by an alleged offender. If the agreement is not executed, the failure should in principle not be considered an aggravating circumstance. However, if the offender willingly frustrates the implementation of the mediation agreement, the court should be able to take this into account (see above).

This implies that information concerning a reprehensible implementation failure of the mediation agreement can be relevant in criminal court. The same is true if the mediation is ensued by civil litigation, although the current type of mediation is unlikely to be followed by civil proceedings based on the impossibility to carry out the agreement. In the first place, the agreement may contain arrangements concerning a small amount of compensation to be paid, or non-pecuniary obligations for the offender. Secondly, if the agreement settles damages and the offender fails to pay these, the criminal court may address this issue as well. This may be different if the criminal court is unable to consider the victim's claim for compensation, for example, because of its complexity. This, however, seems unlikely, since the parties successfully tackled the supposed complexity of the request for damages and reached agreement on the payment of compensation during the mediation. Nevertheless, if the victim's only opportunity to obtain financial compensation is to go to civil court, he may need to use information about the implementation failure to substantiate his claim.

Disclosure of information about an implementation failure may offer a remedy to the victim for the drawbacks caused by the offender's lack of willingness to fulfil the obligations from the agreement, and the court should be able to take this information into consideration. In making this exception to the principle of confidentiality, the essentials of victim-offender mediation and of criminal and civil law should, of course, be respected.

As explained, the main mediation characteristics presuppose that the decision of offenders to take part in victim-offender mediation is indicative of their commitment to contribute to the procedure and to comply with the mediation agreement. An intentional violation of this agreement therefore infringes the main features of the process. This, in combination with the drawbacks that an implementation failure has for victims, leads to the conclusion that the essentials of victim-offender mediation are not violated by making an exception to the confidentiality rule in this context.[446]

Nevertheless, for the information concerned to be admissible in court, its disclosure must not interfere with the essential features of criminal and civil law. What is said in this context about diversionary mediation *mutatis*

446 See also Section 7.3.

mutandis also applies here. This means that the main characteristics of criminal and civil law do not oppose the disclosure and subsequent use of the information concerned in court, as long as the required procedural requirements are sufficiently satisfied.

As for the existing limitations on the use of relevant facts and circumstances in criminal and civil law, the discussion of these issues regarding diversionary mediation is also relevant here, and they consequently do not prevent the use of information about a reprehensible failure of the offender to comply with the mediation agreement.

In conclusion, the essentials of mediation and of criminal and civil law are compatible with making an exception to the principle of confidentiality for information about an intentional implementation failure if the preceding mediation was part of regular court proceedings. The information concerned should therefore be open to disclosure in spite of the current interpretation of the confidentiality rule, and the court should be able to take that information into account in related judicial proceedings.

7.5 Victim-Offender Mediation after Conviction and Sentencing

As this type of victim-offender mediation takes place after the offender has been convicted and sentenced, it will not be followed by related criminal proceedings. The victim may, of course, claim performance of the agreement in civil court, but, for the reasons mentioned above, this is unlikely. In addition, the current modality of victim-offender mediation is not usually focused on reaching an enforceable agreement at the end of the mediation, but rather on the therapeutic value of the process and on achieving closure.[447] In such cases, there is no legal ground for instituting civil proceedings concerning an implementation failure. Moreover, if the parties do arrive at an agreement, it usually does not include the payment of damages, but other forms of compensation, such as an apology by the offender. Obviously, a failure to comply with such obligations is not likely to be the focus of judicial proceedings. Nonetheless, when the outcome of the current type of victim-offender mediation does give cause for civil litigation, the considerations regarding diversionary mediation and mediation as part of regular court proceedings apply here as well. The implication is that a victim who initiates civil litigation to enforce the observance of a mediation agreement should be allowed to disclose information about a reprehensible implementation failure, and the court should be able to take this information into consideration. The opportunity to raise these issues may be crucial, since the victim has no other remedies to seek justice; the criminal justice process has been concluded, as has the mediation process.

447 United Nations Office on Drugs and Crime 2006, p. 77.

7.6 Conclusion

A successful victim-offender mediation is in many cases concluded with an agreement between the victim and the offender. This agreement can include various obligations for offenders in recognition of the needs and feelings of victims, such as paying compensation, making an apology, or performing community service. Offender compliance with the agreement can be regarded as the ultimate acknowledgement of victims and the harm they suffered.

For various reasons, the implementation of a mediation agreement can fail. This can understandably have drawbacks for the victim, especially if the offender consciously and reprehensibly refuses to carry out the duties concerned. Since the current interpretation of the principle of confidentiality implies that the victim cannot talk about such issues, it can be argued that this scope should be reconsidered for reprehensible failures. To this end, the compatibility of such an exception to the confidentiality rule with the fundamentals of victim-offender mediation has been examined, as has the admissibility of the information concerned in criminal and civil court. This has led to the conclusion that information about an intentional implementation failure by the offender should be open to disclosure and can be taken into consideration by the court. These findings apply to all types of victim-offender mediation, in both criminal (modalities one and two) and civil (modalities one, two, and three) proceedings.

8 Procedural Position of the Mediation Participants

8.1 Introduction

The previous chapters discussed several frictions between the confidential nature of victim-offender mediation and the essential elements of criminal and civil law. Three potential exceptions to the current principle of confidentiality were formulated. An exception should be made for when the offender commits a new crime against the victim during the mediation, or reveals information about other crimes. Confessional statements of the offender, including the acknowledgement of basic facts, and the reasons for a reprehensible implementation failure of the mediation agreement should also be open to disclosure. Allowing the mediation participants to disclose the information concerned aims at relieving the harm caused by these disruptions.

The current chapter will examine the mediation participants' opportunities to disclose mediation information in the course of judicial proceedings. These opportunities are important here, since they influence the effect of making an exception to the principle of confidentiality. If mediation information is admissible in legal proceedings, the court can take it into consideration, and the victim can expose the behaviour of the offender. In the previous chapters, the admissibility of mediation information in court was examined as a factor that influences the advisability of making an exception to the principle of confidentiality. However, admissibility is only half of the story. The other half concerns the procedural position of the mediation participants, and their opportunities to present information in court. The participants in mediation that become involved in civil or criminal proceedings may find themselves in a difficult position. On the one hand, the advocated scope of the principle of confidentiality requires that they keep all mediation communication secret. On the other hand, the law may stipulate that they make a statement and provide the requested information. In some cases, they may also have the right to make a statement. These factors may influence the participants' chances of bringing information to the attention of the court, and thus the suitability of information disclosure as an effective remedy.

This chapter will therefore discuss the procedural position of the mediation participants and their opportunities to submit information in judicial proceedings. The position of each mediation participant (the victim, the mediator/professional caregiver, and the offender) will be examined separately, for both criminal law and civil law. The main findings will be summarised in the conclusion.

8.2 The Position of the Victim

8.2.1 Criminal Law

Generally, criminal proceedings will follow a failed diversionary mediation or mediation sessions that were held as part of regular court proceedings. Victims who participated in such mediations may become engaged in a criminal trial,[448] and their different role(s) in court may influence their possibilities to present information.

8.2.1.1 Facilitating the Offender's Prosecution

Victims can facilitate the prosecution of the offender in two ways, depending on the applicable legislation. Some jurisdictions (mainly common-law ones) require for certain crimes that the victim presses charges against the offender, before the latter can be prosecuted. Civil-law jurisdictions generally also recognise the victim's right to report a crime, although the public prosecutor's office can institute proceedings against the offender of its own accord. In many cases, the victim's report of the crime will induce the criminal justice authorities to prosecute the offender. Although not all jurisdictions require the victim to lodge a complaint, cases that are referred to victim-offender mediation will generally have been reported by the victim. After all, starting mediation presupposes that the victim of the crime has been identified, which usually happens through reporting the crime. In addition, most crimes that qualify for mediation only come to the attention of the criminal justice authorities because the victim reports a crime (e.g., assault, or domestic violence).

Some civil-law countries additionally allow victims of some crimes to initiate the offender's prosecution themselves and apply directly to the criminal court. Among others, Germany (*Privatklage* and *Nebenklage*),[449] Belgium (*burgerlijke partijstelling*),[450] and France (*partie civile*),[451] offer victims this opportunity. If the victim privately prosecutes the offender, the requested court should give its ruling on the case. The position of victims who directly apply to the court partly resembles that of the injured party. They have similar opportunities for advancing information in court to substantiate their claim for financial compensation (see further Section 8.2.1.2). Additionally, private prosecution provides victims with some extra powers. The central focus of this section is on the position of victims during the hearing of the case in court and on their opportunities to furnish

448 Victim-offender mediation after conviction and sentencing of the offender will not be discussed here, since it is not followed by a related criminal trial.

449 Articles 374 *et seq.* of the German Code of Criminal Procedure (*Strafprozessordnung*, StPO) and Arts. 395 *et seq.* StPO, respectively.

450 Articles 63 *et seq.* and 182 *et seq.* of the Belgian Code of Criminal Procedure (*Wetboek van Strafvordering*, WvSv).

451 Articles 85 *et seq.* of the French Code of Criminal Procedure (*Code de Procédure Pénale*, CPP).

mediation information as evidence. The relevant powers in this context are interrogating the offender,[452] making a statement,[453] and reacting to the evidence presented.[454] Victims may use these powers to present mediation information that falls within the scope of the exceptions to the confidentiality rule, or request the offender to reveal such information,[455] if, that is, the victim prosecutes the offender privately, and the case is subsequently referred to victim-offender mediation, and then followed by a criminal trial. This, however, is not a likely scenario; it may not be useful to refer cases to victim-offender mediation that involve victims who have decided to prosecute the offender privately, since it is unlikely that victims will have come to this decision if their conflict with the offender could have been more easily resolved otherwise. Also, the institution of proceedings may damage the relationship between the victim and the offender to the extent that mediation is no longer an option.

In other respects, the victim's opportunities to facilitate the prosecution of the offender are largely irrelevant here. After all, victims will generally lodge their complaint before the start of a victim-offender mediation, and that moment will then coincide with the crime coming to the attention of the criminal justice authorities. As a result, the victim's report or charge is unlikely to contain confidential information from the mediation. It may, however, lead to the identification of the offender and thus to the subsequent referral to victim-offender mediation. If the victim's report needs further explanation during the hearing of the case, the victim can be summoned as a witness after the mediation is concluded (see Section 8.2.1.4).

8.2.1.2 Injured Party

In many jurisdictions, victims can join criminal proceedings as the injured party. As such, the victim can claim damages without starting civil litigation.[456]

It is likely that the topic of financial compensation is addressed during the victim-offender mediation that precedes the criminal proceedings. The victim is therefore most likely to join the proceedings as the injured party when the mediation has failed or – less probable – when the victim and the offender have reached an agreement on other issues, but not on the compensation to be paid. In such cases, the victim can apply to the criminal court for damages. The damage suffered should be the result of the crime. It

452 For example, Art. 397 in conjunction with Art. 240, para. 2 StPO. The position of offenders during interrogation will be discussed in Section 8.4.1.

453 For example, Art. 385 StPO.

454 For example, Art. 397 in conjunction with Arts. 257 and 258 StPO.

455 The position of the offender, who participated in mediation, during a criminal trial will be discussed in Section 8.4.1.

456 In some countries, for example, in the Netherlands, an injured party can only join the criminal proceedings if its claim is uncomplicated in nature. In other jurisdictions, such as Belgium, this condition does not apply.

is therefore unlikely that the victim will substantiate the claim with confidential information from the mediation, since the damage was caused prior to the mediation, and confidentiality problems are therefore improbable. However, if an additional explanation of the claim is needed, victims can be summoned as witnesses (see Section 8.2.1.4). The implications of what should happen if they are asked about the contents of the mediation in that capacity will be discussed below.

8.2.1.3 Victim Impact Statement

The third opportunity for the victim to participate in a criminal trial is by making a victim impact statement (VIS).[457] A VIS can generally be made orally or in writing, and relates the consequences of a crime for the victim. In the majority of cases, a VIS is not considered a deposition and the victim is not sworn in prior to making the statement. If a VIS is challenged, the victim must usually take an oath, and be heard as a witness (see Section 8.2.1.4).[458]

The significance of a VIS after the victim and the offender have participated in mediation can be questioned, since mediation also enables the victim to talk about the impact and the consequences of the crime. However, when the mediation has failed, victims may feel strongly about sharing their experiences with the court – they want to be properly heard. In such cases, victims may want to include their impressions from the mediation in the VIS. Should they be allowed to do so? After all, the current interpretation of the principle of confidentiality seems to be at odds with disclosure of such issues.

Their informed and voluntary participation in mediation may indicate that victims should respect mediation confidentiality when issuing a VIS. The victim determines the contents of the VIS, and, as a result, can decide to maintain the required level of secrecy. However, since there are three situations in which it should be possible to bypass the confidentiality rule, victims should be able to include the information concerned in their VIS, especially since the VIS is one of the main instruments for victims to express

457 Among others, see J. Chalmers *et al.*, 'Victim Impact Statements: Can Work, Do Work (For Those Who Bother to Make Them)', *Criminal Law Review* 2007-5, pp. 360-379; J.V. Roberts & A. Edgar, *Victim Impact Statements at Sentencing: Judicial Experiences and Perceptions*, Ottawa: Department of Justice Canada 2006; A. Pemberton, 'Het spreekrecht: vergelding of herstel?', *Tijdschrift voor Herstelrecht* 2005-3, pp. 34-44; A. Sanders *et al.*, 'Victim Impact Statements: Don't Work, Can't Work', *Criminal Law Review* 2001-6, 447-458; and R. Morgan & A. Sanders, *The Uses of Victim Statements*, London: Home Office Research Development and Statistics Directorate 1999.

458 See, e.g., M.J. Alink & P.D.J. van Zeben, *Getuigen in het Nederlands Strafproces*, Nijmegen: Wolf Legal Publishers 2007, p. 146. Not all jurisdictions offer victims the opportunity to make a VIS. Also, the conditions mentioned here do not necessarily apply in all cases and may differ between countries. The same goes for when the VIS is used during the proceedings. For example, in some countries, victims may issue their VIS during the investigation at the hearing and prior to the verdict or judgement, while in other jurisdictions, the VIS is issued during the sentencing stage, after the offender has been found guilty.

themselves during the trial phase. This holds especially true for countries that recognise the guilty plea bargaining. These jurisdictions have different procedures for accused that plead guilty or not guilty. When they plead not guilty, their case is submitted to the court for its assessment, but when they plead guilty, often the prosecution and the defence agree to a lesser charge or punishment. If such an agreement is reached, the offender is not brought to trial.[459] Cases that have been the subject of victim-offender mediation often involve a confession by the offender (see Chapter 6.3), and it is therefore likely that plea bargaining will occur. Since the case will then no longer be the subject of a regular criminal trial, victims will be unable to advance information about the mediation during the hearing of the case in court. Issuing a VIS, which can be taken into account during the sentencing process (including plea bargaining),[460] is then the only way for victims to be heard and to influence the proceedings. The concept of plea bargaining is a significant element of the criminal justice system in the United States, and forms of plea bargaining can also be found in other common-law jurisdictions, such as the United Kingdom.[461] Civil-law countries generally do not recognise this concept,[462] or a highly restricted version,[463] despite the fact that the organisation of their criminal proceedings may partially resemble that of common-law criminal proceedings (see further Section 8.2.1.4).[464]

The disclosure of mediation information in a VIS should nevertheless be limited to the proposed exceptions so as to safeguard the confidentiality of the remaining contents of the mediation session.

459 For example, regarding the course of events in this respect in the United Kingdom, see J. Feldman, 'England and Wales', in: C.M. Bradley (ed.), *Criminal procedure. A Worldwide Study*, Durham: Carolina Academic Press 2007, p. 177; and J.R. Spencer, 'The English System', in: M. Delmas-Marty & J.R. Spencer (eds.), *European Criminal Procedures*, Cambridge: Cambridge University Press 2002, pp. 163-164 and 179-181; regarding the United States, see C.M. Bradley, 'United States', in: Bradley (ed.) 2007, p. 543; and F. Tulkens, 'Negotiated Justice', in: Delmas-Marty & Spencer (eds.) 2002, pp. 661-662.

460 In the United Kingdom, only a written VIS will be accepted at this point (Feldman 2007, p. 191). In the United States, victims should be consulted by the prosecution as to the disposition of the case, including plea bargaining (Bradley 2007, p. 546).

461 Feldman 2007, pp. 176-177; Bradley 2007, pp. 543-544; C.H. Brants & B. Stapert, *Plea Bargaining in de Verenigde Staten en in Engeland en Wales*, Utrecht: Willem Pompe Instituut voor Strafrechtswetenschappen 2003; and Tulkens 2002, pp. 664-668.

462 E.g., criminal proceedings in the Netherlands do not distinguish between accused that plead guilty and those that do not. A confession on its own is considered insufficient for a conviction. See G.J.M. Corstens, *Het Nederlands Strafprocesrecht*, Arnhem: Kluwer 2008, pp. 677-678.

463 Such as the French *comparution sur reconnaissance préalable de culpabilité* (R.S. Frase, 'France', in: Bradley (ed.) 2007, p. 227). Further, e.g., P.J. Delage, 'La comparution sur reconnaissance préalable de culpabilité: quand la pratique ramène à la théorie', *Recueil Dalloz de doctrine de jurisprudence et de législation* 2005-29, pp. 1970-1973.

464 As, for example, in Belgium, where lay judges participate in the administration of justice (as also happens in many common-law jurisdictions), but where plea bargaining is not allowed (C. van den Wyngaert, *Strafrecht, strafprocesrecht en internationaal strafrecht*, Antwerp/Apeldoorn: Maklu 2006, p. 1081).

8.2.1.4 Witness

The fourth and most significant position of the victim in a criminal trial is that of a witness. If victims join the process as injured parties or make a VIS, or if their report is insufficiently clear, they can be requested to testify for the purpose of clarification. They can also be summoned as witnesses for other reasons during the hearing of a case, by the public prosecutor, the defence, or the court. The right of the defence to call witnesses derives from the right to a fair trial and from the right of the accused to examine or have examined witnesses against them.[465] This right is not absolute; the ECHR allows domestic courts a measure of discretion to set the conditions for calling witnesses, as follows from Art. 6, para. 3, under d ECHR, and also from Art. 14, para. 3, under e of the ICCPR.[466] These conditions apply equally to the defence and the prosecution.

Hearing witnesses is one of the main instruments for courts to support the fact-finding process, and people who are called in evidence have few options to refuse to give testimony. Legislation on witnesses diverges between countries. This is partly due to the differences between jury systems and non-jury systems. Most common-law jurisdictions recognise the option of trial by jury and therefore generally require that evidence is produced in the presence of the court during such proceedings; witnesses should therefore be heard during the actual hearing of the case. Some civil-law countries also allow lay persons to participate in the administration of justice, mostly on a bench that comprises both professional and lay judges.[467] These courts mostly deal with severe crimes.[468] In civil-law countries with some form of lay justice, it is also considered important that evidence is produced during the hearing of the case in lay procedures. Civil-law jurisdictions that do not recognise lay judges[469] often rely on the information that has been gathered during the preliminary investigation. In such cases,

465 Cf. Art. 6, para. 3, under d ECHR and Art. 14, para. 3, under e ICCPR.

466 See also P. van Dijk *et al*. (eds.), *Theory and Practice of the European Convention on Human Rights*, Antwerp/Oxford: Intersentia 2006, pp. 648-649; and Chapter 4.3.2.1.

467 Such as the Belgian *Hof van Assisen* (Van den Wyngaert 2006, pp. 594-599), the French *Cour d'Assises* (W. Roumier, *L'Avenir du Jury Criminel*, Paris: Librairie Générale de Droit et de Jurisprudence 2003), and the German *Amtsgericht* and *Landgericht* (T. Weigend, 'Germany', in: Bradley (ed.) 2007, pp. 263-264; S.H.E. Janssen & M.T. Croes, *Niet-rechterlijke actoren in de rechtspraak van Nederland, Denemarken en Duitsland*, The Hague: WODC 2005, pp. 20-21; and R. Juy-Birmann, 'The German System', in: Delmas-Marty & Spencer (eds.) 2002, p. 298).

468 For example, the Belgian *Hof van Assisen* generally deals with crimes which carry a penalty of over twenty years (Van den Wyngaert 2006, p. 595). An exception to the tendency that lay justice in civil-law countries is reserved for serious crimes is the German *Amtsgericht*, which has jurisdiction over crimes for which the sentence anticipated by the public prosecutor is more than two years (Weigend 2007, p. 263; Th.A. de Roos, *Is de invoering van lekenrechtspraak in de Nederlandse strafrechtspleging gewenst?*, Tilburg: Universiteit van Tilburg 2006, p. 55; Janssen & Croes 2005, pp. 20-21; and Juy-Birmann 2002, p. 306).

469 Such as the Netherlands (De Roos 2006; Janssen & Croes 2005, pp. 8-11; and J.R. Spencer, 'Introduction', in: Delmas-Marty & Spencer (eds.) 2002, p. 13).

the court generally uses records of witness statements to the police. Civil-law jurisdictions which do use lay justice for specific crimes also generally rely on previously gathered information in other proceedings which do not involve laymen.[470] The differences between these systems understandably influence the position of witnesses.

A summoned witness is in principle obliged to give testimony. In many jurisdictions, witnesses have a legal duty to appear before the court and to answer the questions asked truthfully. A violation of this duty is in some cases punishable by law. Furthermore, certain coercive powers can be exerted to enforce witnesses to show up in court, or to make a statement. This type of legislation is common to civil-law countries. It can, for example, be found in the Netherlands (Articles 213, 221, 287, and 294 of the Dutch Code of Criminal Procedure (*Wetboek van Strafvordering*, WvSv),[471] Belgium (Arts. 80 and 157 of the Belgian WvSv)[472] and Germany (Arts. 51 and 70 StPO).[473] In common-law countries, such as the United States and the United Kingdom, the obligation of witnesses to appear and to make a statement depends on their competence and their compellability. The witnesses' competence concerns their ability to give testimony; in general, all persons are considered to be competent, unless special regulations apply. Competent witnesses can normally be compelled to testify. Failure to comply with an order to appear as a witness or to answer the questions asked can lead to imprisonment, or a charge of contempt of court.[474] Consequently, witnesses in all systems can be obliged to make a statement, and they can be punished for failing to comply with a request to do so.

Although the obligation to appear as a witness is a factor common to many jurisdictions, it is not absolute. People who are called in evidence can refuse to make a statement if they can invoke a privilege. A victim can – under certain circumstances – refrain from making a statement based on relational grounds, for example, if the offender is the partner, ex-partner or a close relative of the victim. Victims can also abstain from giving testimony if this will lead to self-incrimination, or to incrimination of one of the persons the relational privilege applies to.

470 E.g., E. van Fraechem & P. Traest, 'Is er een toekomst voor de juryrechtspraak?', *Jura Falconis* 1999-2000, pp. 95-104.

471 See, e.g., Alink & Van Zeben 2007, p. 31; and G.P.M.F. Mols, *Getuigen in strafzaken*, Deventer: Kluwer 2003, pp. 235-259.

472 See, e.g., R. Verstraeten, *Handboek Strafvordering*, Antwerp/Apeldoorn: Maklu 2005, pp. 428-431 and 936-939.

473 See, e.g., U. Eisenberg, *Beweisrecht der StPO. Spezialkommentar*, Munich: C.H. Beck 2006, pp. 285-349.

474 See, e.g., P. Murphy, *Murphy on Evidence*, Oxford: Oxford University Press 2005, pp. 472-474; P. Roberts & A. Zuckerman, *Criminal Evidence*, Oxford: Oxford University Press 2004, pp. 222-228; and S. Seabrooke & J. Sprack, *Criminal Evidence and Procedure: the Essential Framework*, London: Blackstone Press Limited 1999, pp. 20-22.

In conclusion, victims who are called as witnesses, should in principle appear before the court and truthfully answer the questions asked. This implies that they should also respond to questions about the contents of a preceding victim-offender mediation.[475] There is no conflict with the principle of confidentiality; as long as this rule is not incorporated in legislation as well, it cannot overrule a legal obligation.

In Chapter Three, the codification of the confidential nature of victim-offender mediation on national level was discussed. There are, however, few countries that have laid down this rule in legislation. In a number of countries, victim-offender mediation has no legal basis whatsoever. In other countries, the confidentiality requirement is often included in lower-ranking regulations, such as ministerial directives,[476] or guidelines issued by organisations that are involved in victim-offender mediation.[477]

The Belgian Code of Criminal Procedure (*Wetboek van Strafvordering*, WvSv) is one of the few examples of national legislation that includes a provision on the confidential nature of victim-offender mediation. It requires the secrecy of documents drawn up during the mediation session, and of statements of the parties. Consequently, mediation information cannot be used in subsequent criminal (or civil/administrative/arbitral) proceedings. If the information is disclosed notwithstanding, the court must disregard it. Furthermore, mediators cannot be summoned as witnesses, nor can they disclose any information that they have learned by virtue of their profession.[478] The Belgian law furthermore states that the victim and the offender can reach an agreement on the disclosure of particular information. Consequently, there is no room for the parties to disclose information without the approval of the other party. This means that under Belgian law they may currently be unable to disclose information to which one of the three exceptions to the confidentiality rule applies, especially since it is improbable that both parties will agree on the disclosure of such issues; for example, it is likely that offenders will try to prevent victims from revealing

475 In principle, the questioning of witnesses should be limited to the observation of witnesses in relation to the offence. It may be argued that questions pertaining to the contents of mediation cannot be designated as such, since they do not pertain to the question whether the offender has committed the crime concerned. The witness may refuse to answer questions about mediation information for this reason. However, it is not up to witnesses to assess the admissibility of the questions asked; this is generally left to the discretion of the court. Furthermore, it may be difficult in practice to determine whether the mediation information that is requested from the witness can play a role in answering the question of the offender's guilt. In addition, if witnesses are examined in relation to a situation justifying an exception to the principle of confidentiality, they should be free to answer these questions, since this information should be open to disclosure. For these reasons, it will be assumed that the questioning of witnesses can include questions regarding a preceding victim-offender mediation.

476 For example, Poland and Norway (see Chapter 3.5.2 and references there).

477 For example, the Recommended Ethical Guidelines issued by VOMA (see Chapter 3.5.2).

478 Art. 555, para. 3 WvSv.

that they have committed another crime during the mediation.

The Belgian law does not provide further specifics about the position of the victim or the offender during hearings. It does not specify which legal duty should prevail, if one of the parties is requested to make a statement about the contents of the mediation; the obligation to give testimony, or the statutory duty to observe secrecy (apart from contractually approved information). It can, however, be assumed that Art. 555 WvSv as a *lex specialis* prevails over the general provisions on witnesses.

The fact that a legal obligation to give testimony is a factor common to many jurisdictions precludes the victim from refusing to answer questions about the contents of a preceding victim-offender mediation, since mediation confidentiality has generally not been incorporated in legislation. Victims can be obliged to reveal what the parties discussed in mediation, such as the offenders' reasons for committing the crime. Such information can be considered an important aspect of mediation – after all, mutual understanding often starts with comprehending the other person's motives – but may incriminate the offender when it is revealed in court. Consequently, the absence of a legal basis for the principle of confidentiality may negatively impact on the appeal for the offender to take part in mediation.

A solution to this problem would be to include the principle of confidentiality in legislation. Statutory protection of the secret nature of mediation information would comprise an exception to the general obligation to testify, and the mediation participants would then be able to observe the secrecy of the mediation contents if requested to give testimonial evidence. The victim would be able to refuse to answer questions about the context of the mediation. Legal incorporation of the confidentiality rule would also prevent the statutory obligation to give testimony from being misused to submit mediation information in court. For example, the prosecution would no longer be able to question the victim about the offender's behaviour during the mediation, if that behaviour does not relate to the three exceptions.[479] Another advantage of incorporating the confidentiality rule in legislation is that it would end the current ambiguous situation regarding the status of mediation information; it would be clear to all persons involved that the secrecy of the matters discussed in mediation should in principle be observed. Furthermore, a statutory duty to respect the confidentiality of the mediation process would recognise the general nature of this principle and its importance for the success of victim-offender mediation. The final reason is that the legal confidentiality of mediation information would imply a limitation on one of the main features of criminal law, namely the fact-finding process. The obligation to give testimony partly follows from the main objectives of criminal law; the elucidation of the facts

479 That is, unless the victim and the offender agree on the disclosure of further information.

and circumstances pertaining to a crime. Enabling mediation participants not to disclose mediation information would restrict the fact-finding process. Given its fundamental importance for criminal law, this limitation should have a foreseeable and clear basis in legislation.

However, securing the confidentiality of the contents of mediation in legislation is but the beginning. After all, such a course of action does not reflect the justifiability of breaching mediation confidentiality in three situations, namely if the offender commits another crime during the mediation or reveals information about other crimes, if the offender makes confessional statements during the mediation, or if the implementation of the mediation agreement fails due to reprehensible behaviour of the offender. In the previous chapters, it was argued that disclosure of information about these three situations is necessary to remedy the impact they have on the victim and the mediation procedure. These exceptions were identified after careful consideration of the interests involved. Circumvention of confidentiality should therefore be limited to these situations in order to prevent erosion of the confidentiality principle. For these reasons, it is crucial to include the above-mentioned exceptions in legislation as well. Current legislation, such as in Belgium, does not suffice, since it only guarantees mediation confidentiality, without acknowledging that there may be exceptions.[480]

Codification of the principle of confidentiality and its exceptions would enable victims called as witnesses to refuse to give testimony about mediation issues despite the legal obligation to testify. Additionally, it would give victims the opportunity to disclose the issues the exceptions pertain to in court if they come up during questioning. For example, when at trial the offender withdraws a confession made in the course of a mediation, the prosecution can approach the victim as a witness and question him or her about the offender's previous admission of guilt. Victims can then reveal the confessional statements concerned to the court, and may thus challenge the offender's withdrawal of a confession in court.

The issue of codification of mediation confidentiality also raises the question how a violation of such legislation should be dealt with. If mediation information is wrongfully disclosed in court, the most obvious way of repairing this is to leave the information concerned out of the official deliberations. As a result, the court cannot make use of this information to substantiate its decision. A disadvantage of this measure is that the court in charge of the case will generally rule on the wrongfulness of the disclosure itself.[481] Consequently, it cannot be excluded that the court takes notice of these matters and is influenced by them. However, rejecting the information

480 Apart from the possibility that the victim and the offender can agree on the disclosure of certain issues (Art. 555, para. 1 WvSv).

481 Cf. the remarks made in Chapter 4.3.5.3 about the exclusion of unlawfully obtained evidence in criminal law.

concerned is the only way of dealing with wrongful disclosure of mediation information, without terminating the proceedings at hand. Under certain circumstances, the court may compensate the party that is disadvantaged by the wrongful disclosure; for example, the court can mitigate the sentence to be imposed on the offender, if the victim reveals too much of the mediation contents.[482] Nevertheless, in view of the above, prevention of the wrongful disclosure of mediation information is paramount. Codification of the confidentiality principle and its exceptions will ensure the highest degree of clarity possible about what mediation information can and cannot be divulged in court.

8.2.1.5 Admissibility of Witness Statements

The main reason for making exceptions to the principle of confidentiality is to offer the victim a remedy for the drawbacks that are caused by the behaviour of the offender. For instance, when the victim experiences distress through suffering another crime during the mediation,[483] the corresponding exception enables the victim to denounce this event during the hearing and bring it to the attention of the court. From this it follows that it is important that the victim has an effective opportunity to disclose the information about the offender's behaviour. Victims should have a position during court hearings that allows them to make a statement that can be taken into consideration by the court. The victim's opportunities to do so as the reporter of the crime, the injured party and the maker of a VIS were discussed above. Furthermore, the discussion of the victim's position as a witness included the issue of how the principle of confidentiality and its exceptions should be positioned *vis-à-vis* the legal obligation to give testimony. The next step is to examine the use of the victim's deposition regarding the mediation contents as evidence.

In general, the contents of a witness statement must concern facts or circumstances that witnesses have observed or experienced themselves.[484] This includes sensory perceptions, such as when the witness sees the offender stabbing another person. Furthermore, witnesses can testify about their state of mind (e.g., fear or shock) at a particular moment. A special category of observations is formed by verbal or written statements of others to the witness, or in the presence of the witness. In a way, it could be argued that the witness perceives another person as making a statement, and that such a statement can be part of the witness's deposition. However, testimonial evidence about statements made by third parties is not admissible in all cases. Under certain circumstances, such statements can be qualified as 'hearsay', and as such can be deemed inadmissible in court.

482 Or award damages to the party injured by the wrongful disclosure.
483 See Chapter 6.2.1 and references there.
484 For example, see Art. 71 of the Belgian WvSv, Art. 342 of the Dutch WvSv, and Art. 69 of the German StPO.

Hearsay evidence is generally inadmissible in jury trials, and thus in most common-law countries. In most civil-law jurisdictions, third party statements are accepted as evidence in non-lay procedures, both orally (e.g., a witness testifies about what another person has told him or her) and in writing (e.g., the record of a witness statement as taken down by the police). The admissibility of hearsay evidence in both legal systems will be discussed in more detail below.

Whether a deposition containing a third party statement (hereafter: the original statement) should be considered hearsay depends on the question for what purpose the original statement is tendered by the witness. The key issue is whether the witness statement solely concerns an observation of the witness, or whether the deposition is focused on the actual contents of the original statement; if the original statement is relevant for a purpose other than proving the truth of some fact asserted in it, it is not hearsay evidence.[485] The following categories of non-hearsay statements and examples will illustrate this. The first concerns the situation that the original statement has legal effect or significance, and that making the statement has legal consequences.[486] In addition, if an original statement is furnished to prove that it was made, or was made on a particular occasion, or in a particular way, it is also admissible.[487] For instance, the observation of a witness that the alleged offender uttered a threat may be used as evidence that the defendant is guilty of threat of violence.[488] The fact that the threatening statement was made has a legal consequence, namely a charge of menace. Moreover, the statement is put forward solely to prove that it was made, and in a particular (i.e., threatening) manner. Another category of non-hearsay statements includes statements that are produced as evidence of the state of mind of another person.[489] The witness may, for example, state his view that the accused acted as if he was guilty, because he offered an explanation for his behaviour which later proved false.[490]

Statements that can be qualified as non-hearsay statements are generally admissible in common-law and civil-law countries. Insofar as information pertaining to the exceptions to the confidentiality rule can be qualified as such, victims have the opportunity to disclose this information as part of their testimony. The offender committing another crime during the mediation will generally fall into this category. If the offender physically attacks the victim during the mediation, the victim can testify to this event because he or she experienced the offender's attack. When the offender

485 Murphy 2005, pp. 208-209; and Roberts & Zuckerman 2004, p. 586.
486 Murphy 2005, pp. 211-212.
487 Murphy 2005, p. 212.
488 Cf. the situation that the witness observed the alleged offender stabbing another man; this may be used as proof that the defendant is guilty of manslaughter.
489 Murphy 2005, pp. 212ff.
490 Cf. the situation that the witness saw the accused blush on being asked to explain his behaviour; this concerns a sensory perception of the witness.

commits a 'verbal' offence, such as uttering a threat, the victim can bear witness to this, since the offender's utterance constitutes the victim's perception of the fact that the offender is guilty of menace. As a result, information about committing another crime against the same victim during the mediation is generally admissible as evidence in court. However, revelations of the offender regarding other crimes should in most cases be considered hearsay. The same goes for the second exception, pertaining to confessional statements made by the offender in the course of mediation. The possibilities for victims to disclose such statements in their deposition will be discussed below. The third exception concerns information about an intentional implementation failure of the mediation agreement. Insofar as this information concerns sensory perceptions of the victim, it is admissible as evidence. This can, for example, include the victim's observation that the offender has not paid the agreed compensation instalments. It may also involve the victim's perception of the behaviour of the offender in mediation during the negotiations about the mediation agreement. The offender's expression, but also his tone of voice during the negotiation (a statement made on a particular occasion, or in a particular way) can be relevant factors. However, as the following example illustrates, borderline cases may occur. If the offender, at the time of the conclusion of the mediation agreement, friendly addresses the victim by saying: 'I will gladly pay EUR 500', this statement is admissible as evidence of the offender's approving state of mind. However, the statement should be considered hearsay evidence if it is disclosed to prove that the offender was aware of the fact that he had to pay the victim EUR 500, since the statement is then used to prove a fact that is asserted in it. Furthermore, it is possible that the statements of the other mediation participants, such as the mediator or a professional caregiver, are used in the investigation into the backgrounds of an implementation failure. Under certain circumstances, these statements can also be considered hearsay, and for the same reasons.

Another category of non-hearsay statements consists of statements that quote an original statement that was made in the course of the proceedings.[491] Consequently, if the victim quotes statements of the offender made earlier during the criminal trial, the victim's testimony is admissible.

Summarising, the victim has an effective opportunity to submit information about the offender having committed another crime during the mediation, and, in some cases, information about an intentional implementation failure of the agreement as non-hearsay statements in both civil-law and common-law jurisdictions. The admissibility of the information pertaining to the three exceptions that should be considered hearsay will be discussed below.

Out-of-court statements that do not fall into the categories mentioned above

491 Murphy 2005, pp. 207-208.

should be considered hearsay. Hearsay evidence consists of a repetition of out-of-court statements, which the witness learned from another person. These statements concern 'any representation of fact or opinion made by a person by whatever means',[492] and can be made orally and in writing. In the context of victim-offender mediation, the out-of-court statement that is repeated will mainly have been made orally. The confidential nature of victim-offender mediation indicates that usually only the persons that were present during the session can disclose its contents. If they report on the contents of the mediation, this will usually require that they reproduce statements of the other participants. For example, if the victim challenges the offender's withdrawal of a confession during the court hearing and discloses the relevant confessional statements of the offender, the victim will repeat statements the offender made during the session. Furthermore, if the victim denounces an implementation failure of the agreement, the court may request the mediation participants to reproduce statements of the other participants.

The admissibility of testimonial evidence that can be qualified as hearsay differs between countries. This may affect the opportunities for the victim to submit information regarding the three exceptions to the confidentiality rule as proof, and to experience a breach of the mediation confidentiality as a true remedy for the harm suffered.

Hearsay evidence is essentially inadmissible in common-law jurisdictions. Proceedings in common law are mainly conducted orally. The production of proof is generally left to the defence and the prosecution; as a rule, the court has no control over the issues debated.[493] Because of this, the direct questioning and cross-examination of witnesses is considered a significant aspect of criminal proceedings. Admitting hearsay statements as evidence is therefore considered unacceptable, since the evidence concerned might be assessed incorrectly, because the reliability of the original statement cannot be verified[494] – the maker of the original statement has not made his or her statement on oath. Although witnesses that present the hearsay statement may be telling the truth about what they observed, this does not guarantee the veracity of the original statement.[495] For these reasons, countries such as the United States and the United Kingdom in principle forbid the use of hearsay statements as evidence. This general ban on hearsay evidence (hereafter: the hearsay rule) has been elaborated on in legislation and case law, and there are many exceptions. These will be addressed below insofar

492 Roberts & Zuckerman 2004, p. 585.

493 See, e.g., Murphy 2005, pp. 2 and 76ff.; and Seabrook & Sprack 1999, pp. 8ff.

494 A. Rodrigues & C. Tournaye, 'Hearsay Evidence', in: R. May *et al*. (eds.), *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald*, The Hague: Kluwer Law International 2001, pp. 292-293.

495 See, e.g., Roberts & Zuckerman, pp. 596-598; and A.L.-T. Choo, *Hearsay and Confrontation in Criminal Trials*, Oxford: Clarendon Press 1996, pp. 11-43.

as they apply to the disclosure of mediation information in court.

One of the main exceptions to the hearsay rule pertains to confessions.[496] A 'confession' in this respect concerns 'any statement wholly or partly adverse to the person who made it, whether made to a person in authority or not and whether made in words or otherwise'.[497] Statements made by the offender that reflect badly on him can be qualified as such, and are admissible as evidence in spite of the hearsay rule. The main reason for this is that it is generally assumed that no one voluntarily makes false adverse statements about themselves. From this it follows that the offender should not be pressured, threatened or coerced in making a confession.[498]

Confessional statements that the offender makes in mediation, such as the acknowledgement of basic facts, can be categorised under this exception to the hearsay rule. After all, confessional statements are generally adverse to the offender. The voluntary nature of the offender's participation in mediation and his freedom to withdraw from the process at any time, presuppose most confessions are made voluntarily. Victims should therefore be able to include these matters in their testimony as an effective opportunity to submit these matters in court. In addition, revelations about other crimes may also qualify as a confession in many cases, and victims should therefore be allowed to furnish these matters in court as well. For example, if an offender admits during mediation that he has robbed other victims in the past, this can be considered an adverse statement. The same goes for an offender's revelation – in the course of the negotiations about damages – that he is evading tax by working for undeclared payment.

Summarising, victims can disclose information pertaining to the first two exceptions to the confidentiality rule in court. Statements constituting another crime are admissible as non-hearsay evidence, and statements about previous or future crimes and confessions can be categorised under the general exception to the hearsay rule pertaining to confessions. In addition, information pertaining to the third exception, an intentional implementation failure of the mediation agreement, can be part of the victim's deposition insofar as these statements concern direct observations of the victim, such as his not having received a letter of apology, or the offender's perceived consent to the agreement.

However, the statements that may be disclosed as the result of an implementation failure can, under certain circumstances, also qualify as hearsay evidence (see above). The prosecution or defence may question the victim about the position of the mediator during the negotiations about the

496 The exception to the hearsay rule concerning confessions is so common that such statements are sometimes considered non-hearsay evidence. However, as this is not the case in all common-law countries – the admissibility of confessions should be regarded as an actual exception to the hearsay rule – it will be discussed here. See also Murphy 2005, p. 271.

497 Murphy 2005, p. 283.

498 Murphy 2005, pp. 280-286; and Roberts & Zuckerman 2004, pp. 449-457.

agreement, or about whether the offender was aware of the conditions to be included in the agreement. The questioning may then focus on the contents of the statements, and may thus be qualified as hearsay – in which case they are inadmissible in court. The defence or the prosecution can then decide to hear the offender,[499] the mediator, or the professional caregiver,[500] to obtain the information concerned firsthand. In general, it is likely that the mediator and the professional caregiver will be available for questioning during the criminal trial. However, if, for example, the mediator is untraceable or deceased, the hearsay statement may, under additional conditions, be admissible.[501]

Information pertaining to the implementation failure exception is thus generally inadmissible in court, if it is or must be considered hearsay. If the offender is requested to make a statement on the hearsay deposition of the victim and refuses to testify, the information concerned cannot be furnished. Nevertheless, as the mediator and the professional caregiver can usually be heard, and information about an implementation failure is in many cases admissible as non-hearsay evidence, the victim has a reasonable opportunity to disclose information regarding this exception in court under common law.

The use of hearsay evidence is also recognised in the majority of civil-law countries, where it is generally referred to as *de auditu* evidence. The main source of evidence for the criminal court in these jurisdictions consists of the file of the case in proceedings that do not involve lay persons. Among other things, the case file contains the official records of the depositions of witnesses, who are usually heard during the preliminary investigation. Investigating officials file written reports of their interview findings. During the hearing of the case, the court is responsible for the appraisal of the evidence produced and has the power to summon witnesses.

The record of witness statements in the paper file can be qualified as *de auditu* evidence; it constitutes a reproduction of what the investigating official has observed during the interview. Generally, such statements are admissible as evidence in civil-law systems, although their conclusive force can be restricted.[502] The reliability of *de auditu* evidence is guaranteed by the

499 However, the offender then may invoke his right to remain silent (see further Section 8.4.1).

500 The procedural position of the mediator and the professional caregiver will be discussed in Section 8.3.1.

501 On this type of exceptions to the hearsay rule, see Murphy 2005, pp. 228ff.; and Roberts & Zuckerman 2004, pp. 623ff.

502 This does however not mean that the use of *de auditu* evidence was accepted without any resistance in civil-law countries. In case law, some correctional measures have been developed. For example, the reasons stated in the judgement should meet strict requirements. On the discussion about the admissibility of hearsay evidence in the Netherlands, see, e.g., J.F. Nijboer, *Strafrechtelijk bewijsrecht*, Nijmegen: Ars Aequi Libri 2008, pp. 104ff.

power of the court to call the maker of the original statement if it considers this necessary.[503]

The ECtHR does not oppose the use of *de auditu* evidence, although it has stated in the *Lüdi* case that all evidence should in principle 'be produced in the presence of the accused at a public hearing with a view to adversarial argument'[504] in order to protect the accused's right to call and examine witnesses.[505] However, the Court has accepted the use of out-of-court statements that were obtained during the preliminary investigation, as long as the defendant has had an 'adequate and proper opportunity to challenge and question a witness against him'.[506] The opportunity to cross-examine must be offered when the 'original' witness gives testimony, or at a later stage of the proceedings. Whether these conditions are complied with should be assessed in the light of the overall proceedings, and of the specific features of the domestic legislation applicable. If the accused was not given an adequate and proper opportunity to examine the witness, the conviction cannot be based solely on the out-of-court statement.[507] Other evidence corroborating the *de auditu* evidence is then required.[508] Most civil-law jurisdictions have adopted the ECtHR's approach. For example, in Belgium,[509] Germany,[510] and the Netherlands,[511] *de auditu* evidence can be used. However, if the defendant has been unable to hear the witness who made the original statement, the *de auditu* statement needs to be supported by other proof.[512]

An exception to the practice explained above is lay justice in civil-law countries, such as the Belgian *Hof van Assisen* and the French *Cour d'Assises* (see above). In such proceedings, it is usually required that evidence is produced in the presence of the court. This is therefore common practice in the majority of criminal trials in civil-law countries which use lay justice to

503 Rodrigues & Tournaye 2001, p. 293.

504 See the judgement of the ECtHR of 15 June 1992, App. No. 12433/86, para. 47 (*Lüdi v. Switzerland*).

505 See also Van Dijk *et al*. (eds.) 2006, p. 645.

506 See, e.g., the *Kostovski* case of the ECtHR of 20 November 1989, App. No. 11454/85, para. 41 (*Kostovski v. the Netherlands*); and, more recently, ECtHR 2 July 2002, App. No. 34209/96, para. 44 (*S.N. v. Sweden*).

507 Again, see the *Kostovski* judgement of 20 November 1989, App. No. 11454/85, para. 41 (*Kostovski v. the Netherlands*); and, more recently, the ECtHR 20 September 1993, App. No. 14647/89, para. 44 (*Saïdi v France*). See also Rodrigues & Tournaye 2001, pp. 294-295 and references there.

508 Van Dijk *et al*. (eds.) 2006, pp. 645-646 and references there.

509 Van den Wyngaert 2006, p. 1080.

510 L. Meyer-Gossner & J. Cierniak, *Strafprozessordnung*, Munich: C.H. Beck 2008, pp. 972-973.

511 Corstens 2008, pp. 682ff.

512 See, e.g., Alink & Van Zeben 2007, pp. 39ff.; Eisenberg 2006, pp. 293-296; Corstens 2008, pp. 682-690; and Verstraeten 2005, pp. 876-877 and 945. The main reason for allowing *de auditu* evidence to support other evidence was to enable the use of statements of anonymous witnesses without violating basic rights of the accused.

deal with a large number of crimes, such as Germany.[513] Although the case file may play a larger role in civil-law jurisdictions than in lay proceedings in common-law jurisdictions,[514] it is generally required that witnesses are heard directly by the lay court, since often only the professional members of the bench take notice of the paper file,[515] or previous witness depositions are removed from the file before it is put at the bench's disposal.[516] Furthermore, the remarks made above about the hearsay rule in common law generally also apply to lay proceedings in civil-law countries.

Consequently, *de auditu* evidence is admissible in the majority of civil-law countries, as far as non-lay proceedings are concerned. This enables the victim to submit information about other crimes the offender reveals during the mediation, and about confessional statements. The same goes for information about an intentional implementation failure, insofar as this must be qualified as hearsay. However, for the depositions concerned to be used in court, the defence should have an adequate and proper opportunity to challenge the victim's testimony by questioning the maker of the original statement. The court can also order such a hearing. In many cases, the maker of the original statement will be the offender (in the case of the exception regarding the information about further crimes, confessional statements, and possibly regarding the implementation failure). In such cases, the offender can be questioned or make a statement about the victim's deposition.[517] If the original statement reproduces statements of the mediator or the professional caregiver, these persons can subsequently be called as witnesses.

8.2.2 Civil Law

All three types of victim-offender mediation can be followed by civil proceedings. In most cases, such proceedings will be initiated by the victim to obtain financial compensation. Diversionary mediation is most likely to be followed by civil proceedings if the parties have not reached an agreement on the payment of compensation, or if the offender has failed to comply with the mediation agreement, and the criminal court has not awarded compensation, for example, due to the complexity of the victim's claim. A victim-offender mediation that is part of regular court proceedings can be followed by civil litigation on the same grounds. Again, this is most likely when the mediation has failed, but also if the parties reached an agreement

513 De Roos 2006, pp. 56-57; and Janssen & Croes 2005, p. 21.

514 Van den Wyngaert 2006, p. 639; and M. Bonnieu, 'The Presumption of Innocence and the Cour d'Assises: Is France Ready for Adversarial Procedure?', *Revue internationale de droit penale* 2001-1/2, p. 564.

515 E.g., this is the case in Germany (Weigend 2007, p. 254; Janssen & Croes 2005, p. 21; and Juy-Birmann 2002, p. 298).

516 E.g., this is the case in Belgium (Van den Wyngaert 2006, p. 1096). See also B. Pesquié, 'The Belgian System', in: Delmas-Marty & Spencer (eds.) 2002, p. 120.

517 The position of the offender in criminal proceedings will be discussed in Section 8.4.1.

on other issues (such as a letter of apology from the offender), but were unable to settle the payment of damages. No criminal trial will follow mediation that takes place after conviction and sentencing. However, since this type of mediation generally does not focus on obtaining financial compensation, it is unlikely that it will be followed by civil proceedings. The victim may nevertheless still want to claim damages, if these were not awarded during the mediation and the preceding criminal trial.

8.2.2.1 Party (Witness)

The primary position of the victim in civil litigation which follows a victim-offender mediation is that of a party. In most cases, victims will act as plaintiffs, for example, when they submit a claim for compensation.[518] The features of civil law (see Chapter Four) indicate that victims will be responsible for substantiating their claims, if they sue the offender for damages. Substantiating their claim may require information from the mediation. For example, the amount of compensation requested may be influenced by the attitude of the offender during the mediation. If the offender has not cooperated properly, victims could increase their claim on account of the added distress they suffered through the offender's behaviour. The victim may then need mediation information to prove this.

The claimant bears the burden of proof. Among other things, the evidence furnished can consist of documentary evidence, expert evidence, and testimonial evidence. In the current context, the latter category is the most important, as it enables the victim to submit witness statements about the contents of the mediation. Apart from the mediator and the professional caregiver, the main parties that can provide this information are the victim and the offender. If the victim and the offender act as parties in civil litigation, their procedural position as witnesses differs in some respects from that of regular witnesses. The victim's options to furnish evidence as a party witness will be discussed below.[519]

Parties that appear as witnesses can give testimony that substantiates their own claims, or that refutes the claims of the other party. Party witnesses can make a statement of their own volition, or can be called by the opposing party. The option for parties in civil proceedings to appear as party witnesses is common, if relatively new, to most jurisdictions. Currently, most Western countries allow parties to testify.[520] Civil-law jurisdictions that have codified this concept include Austria, Germany, Switzerland, France, and the Netherlands. Austria adopted the party-witness option as early as 1895, when it was introduced as a means of proof in civil cases. In Germany, party oaths could only be taken to either confirm or deny a statement. Later

518 Nevertheless, the following generally applies to both the plaintiff and the defendant in civil proceedings.

519 The offender's position in civil proceedings will be discussed in Section 8.4.2.

520 C.H. van Rhee (ed.), *European Traditions in Civil Procedure*, Antwerp/Oxford: Intersentia 2005, p. 189.

on, the German legislator extended the scope to party witnesses. In Switzerland, a party-witness statement is generally admissible, although the regulations concerned may differ between cantons. French legislation also includes provisions on the opportunity for parties to appear as witnesses, or to summon the other party. The Netherlands accepted the use of party-witness statements as evidence in 1988. In common-law countries, such as the United Kingdom and the United States, such statements can also be used in civil proceedings.[521]

In principle, the regulations that apply to regular witnesses *mutatis mutandis* also apply to party witnesses. Witnesses who are called in the course of civil proceedings have a duty to appear before the court and to truthfully answer the questions asked; this also goes for party witnesses. Such legislation can, for example, be found in the Netherlands (Articles 164, 165, 173, 177, and 179 of the Dutch Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*, Rv)), Belgium (Arts. 926 and 934 GW),[522] and Germany (Articles 390, 391, and 395 of the German Code of Civil Procedure (*Zivilprozessordnung*, ZPO)).[523] In common-law countries, the rules on the competence and compellability of witnesses in civil proceedings also apply to party witnesses.[524]

The main objection to the use of party-witness statements is that their reliability can be challenged. After all, in most cases the testimony of parties serves to substantiate their own claims. For that reason, the testimonial evidence of party witnesses is subject to a number of special regulations. In the first place, all of the jurisdictions mentioned above restrict the conclusive force of the party's statement: it can only be used as secondary evidence and needs to be supported by other proof.[525] If victims act as party witnesses, they need additional evidence to support their statements, for example, by calling the mediator or the professional caregiver as a witness.[526] Secondly, party witnesses cannot invoke the privilege to refuse to testify on relational grounds. The privilege to refuse to testify to prevent self-incrimination and the professional privilege remain in full force. As a result, victims who act as

521 Van Rhee (ed.) 2005, pp. 261ff.

522 See also J. Laenens, K. Broeckx & D. Schreers, *Handboek gerechtelijk recht*, Antwerp/Oxford: Intersentia 2004, pp. 509ff. Arts. 992-1004 of the Belgian GW determine that parties are allowed to give testimony, and that the provisions concerning regular witnesses are equally applicable in that respect.

523 See also A. Baumbach *et al*., *Zivillprozessordnung*, Munich: C.H. Beck 2008, pp. 1478ff. Regarding the parties' possibility to testify according to German law, see Arts. 445 *et seq*. ZPO, and furthermore Baumbach *et al*. 2008, pp. 1584ff.

524 See also A. Keane, *The Modern Law of Evidence*, Oxford: Oxford University Press 2006, pp. 121-124 and 147-150. On testimonial statements of the parties in common-law countries, see, e.g., Van Rhee (ed.) 2005, pp. 261ff.; and Murphy 2005, pp. 447-478.

525 This may, however, be different in the case the subsidiary nature of the party statement causes an infringement of the principle of equality of arms (cf. the *Dombo* judgement of the ECtHR of 27 October 1993, App. No. 14448/88 (*Dombo Beheer B.V. v. the Netherlands*); and Van Rhee (ed.) 2005, p. 251).

526 See further Section 8.3.2.

party witnesses can only refuse to give testimony if this would expose them (or others the relational privilege applies to) to prosecution.[527] A third peculiarity of party witnesses is that they are generally not liable to punishment if they violate the statutory duty to appear before the court and to make a statement. However, the court may draw adverse inferences from a party's absence and its refusal to testify.[528] Party witnesses are also actionable for perjury; if they agree to appear as witnesses, they should therefore comply with their statutory duty to truthfully answer the questions asked.

In civil proceedings, the opportunity for victims to make a statement as party witnesses allows them to present information in court. The question arises what opportunities they have to submit mediation information in this position. Unless indicated otherwise, what is to follow applies equally to victims that make a party-witness statement of their own accord and to victims who are summoned by the other party as party witnesses.

If victims give testimony of their own accord, they initially control the mediation information recorded in their deposition, allowing them to observe the principle of confidentiality to the extent necessary. However, it is likely that victims want to substantiate their claims with mediation information. For example, if the offender threatened the victim during the mediation, the victim may demand a larger amount of compensation from the offender. To substantiate the resulting claim accordingly, the victim will then need to prove to the court that the offender actually threatened him or her, and he or she will therefore need to disclose the mediation information concerned. As long as victims need mediation information relating to the proposed exceptions to the principle of confidentiality – information about other crimes, confessional statements of the offender, or an intentional implementation failure – they should be allowed to include this information in their testimonies.[529] To realise and safeguard the victim's opportunities to do so, it would be advisable to include the confidentiality rule and its exceptions in legislation. This would increase clarity about what mediation information is open to disclosure in court, and additionally emphasise the secret nature of other mediation information.

The legal incorporation of the confidentiality principle would also enable the victim being questioned by the opposing party to refuse to answer further questions about the mediation. After all, party witnesses are legally obliged to give testimony. The statutory protection of mediation confidentiality is needed to sanction an exception to this general

527 The professional privilege to refuse to testify is generally not applicable here, since the victim will usually not participate in victim-offender mediation in the performance of his profession.

528 For example, see Van Rhee (ed.) 2005, p. 242.

529 Additionally, victims can include mediation information in their statement if the parties agree on such disclosure.

obligation.[530] The reasons mentioned in Section 8.2.1 are additional grounds for including the exceptions to the principle of confidentiality in legislation. The third reason for legal incorporation of the confidentiality rule and its exceptions pertaining to civil proceedings is to avoid forum shopping. If the principle of confidentiality were laid down in legislation on criminal law, the statutory incorporation pertaining to civil law will prevent civil proceedings from being abused to obtain mediation information. Otherwise, one of the mediation parties may start civil litigation to be able to question the other party about the contents of the preceding mediation, since mediation confidentiality is not protected under civil law. Consequently, the principle of confidentiality and its exceptions should be equally guaranteed in both criminal and civil law. The remarks in Section 8.2.1 about penalising a violation of the proposed legislation equally apply here.

Including the confidentiality rule and the proposed exceptions in legislation would enable the victim to disclose mediation information pertaining to the three exceptions as a party witness. However, for the victim to feel heard,[531] it is also important that the information concerned is admissible as evidence and can be considered by the court.

8.2.2.2 Admissibility of Witness Statements

As is the case in criminal law, the victim's deposition during civil litigation should concern facts or circumstances that the victim has personally observed or experienced.[532] The discussion of this issue pertaining to criminal law *mutatis mutandis* also applies here.

In common-law jurisdictions, the concept of hearsay is also recognised in civil law. The same categories of non-hearsay evidence can be identified. As a result, the victim is able to furnish proof of the fact that the offender has committed another crime (even if this is a 'verbal' offence). Such evidence should not be considered hearsay, since the threatening statement has legal consequences and can also prove that it was made, or made in a particular manner. The same goes for the offender's reprehensible non-compliance with the mediation agreement; insofar as these events concern sensory perceptions of the victim of the offender's failure, they are admissible in court.

Other revelations of the offender, about other crimes, confessional statements, or an intentional implementation failure, can under certain circumstances be qualified as hearsay. The same goes for statements made by the mediator and the professional caregiver and reproduced by the victim. In common-law countries, such statements are generally

530 The fact that party witnesses will not be punished for a violation of this duty, does not mean that party witnesses do not have to comply with this obligation. Furthermore, the court can draw adverse inferences from the party's refusal to appear or answer questions – these may adversely affect the victim's case.

531 See Chapter 6.2.2 and references there.

532 For example, see Art. 163 of the Dutch Rv and Art. 396 of the German ZPO.

inadmissible as evidence in criminal proceedings. However, such evidence is commonly permitted in civil court.[533] This does not imply that other limitations to its admissibility or value are abandoned; in the first place, the admissibility of hearsay statements remains dependent on the competence of the maker of the original statement to appear as a witness.[534] The offender can generally be considered to be competent, unless he is a minor.[535]

Secondly, the civil court may attach varying value to hearsay evidence, to prevent a violation of the parties' right to adversarial proceedings and cross-examination. The opposing party should have had the opportunity to question the original witness, or should be allowed to do so after the hearsay evidence has been furnished.[536] For example, the offender, as the opposing party, should be able to question the mediator or the professional caregiver at some point in the proceedings, if the victim uses statements of these professionals as hearsay evidence.

In the third place, the original witness should be questioned if possible, instead of presenting his or her statement as hearsay evidence.[537] In criminal law, this may be unfeasible, since the prosecution may be unable to question offenders about a hearsay statement of the victim, if they invoke their right to remain silent. As a result, the offender cannot be obliged to make a statement in this context. However, this is different under civil law. In civil proceedings, the victim can call the offender as a party witness, and the offender is obliged by law to make a statement, unless this would lead to self-incrimination.[538] Except for the latter situation, the offender can thus be questioned directly about the crime and the mediation process. This will enable victims to question offenders about, for example, whether they felt comfortable with the mediation agreement when it was being concluded. This may substantiate the victim's claim that the offender intentionally violated the mediation agreement, and that its failure was not caused by the fact that the offender was forced to agree with unreasonable conditions. In such cases, the victim should call the offender as a party witness, instead of furnishing the latter's statements as hearsay evidence.

Nevertheless, in the case of confessional statements by offenders it is likely that offenders will incriminate themselves when they make a statement about these issues. The victim may then present the offender's utterances as hearsay evidence, and may try to substantiate their claim by questioning the mediator or the professional caregiver.[539] The same goes for the offender's revelations about other crimes. Then, the fourth situation that can influence

533 Murphy 2005, pp. 264-265.
534 Keane 2006, pp. 342-343.
535 Keane 2006, p. 124.
536 Keane 2006, pp. 347-348.
537 Murphy 2005, pp. 266-267.
538 Offenders can therefore refuse to answer questions that would render them liable to being prosecuted.
539 On the position of the mediator and the professional caregiver in civil proceedings, see further Section 8.3.2.

the weight attached to such hearsay evidence may become important; it concerns the question whether the maker of the original statement had an interest in making this statement if it were untrue. After all, this may affect the reliability of the victim's testimony. However, since information about confessional statements or other crimes is likely to be adverse to the offender's case, it is unlikely that the offender's original statements were false.[540] For that reason, it is unlikely that the victim's hearsay evidence will be qualified as unreliable.[541]

It follows that, in common-law countries, evidence pertaining to committing another crime during the mediation, and to an intentional implementation failure, is admissible in civil court as long as it can be qualified as non-hearsay evidence. The victim can therefore present this evidence as a party witness. Furthermore, hearsay evidence is in principle admissible in civil litigation, unless the maker of the original statement can be heard about the issue at hand. This will generally not be a problem in this context, since the victim can call the offender as a witness or party witness, and the offender should subsequently give the required testimony, unless this would lead to self-incrimination. Generally, the offender can be questioned directly about an implementation failure. The second situation will mainly occur in the case of confessional statements or information about other crimes. Nevertheless, such statements can in many cases be considered adverse to the offender's case, and their reliability is therefore unlikely to be challenged. Furthermore, victims may summon the mediator or professional caregiver to substantiate the victims' depositions. Naturally, it remains at the court's discretion to assess the truth of the witness statements.

In civil-law countries, the use of *de auditu* evidence is generally accepted in civil proceedings;[542] the witness's observation of a statement made by a third person is usually considered to be part of the facts and circumstances that the witness experienced or perceived.[543] Nevertheless, the civil court is free to weigh the evidence that is produced by the parties. The importance that is consequently attached to *de auditu* statements may therefore depend on the factors mentioned above concerning common law. For the reasons stated there, it is unlikely that these factors have a negative effect on the reliability of the evidence concerned. The victim should, however, summon the original witnesses (the offender, mediator, or professional caregiver) rather

540 Cf. the exception to the hearsay rule of criminal law concerning confessional statements; such hearsay statements are admissible since it is unlikely that someone will make a false statement that may have an adverse effect on their case.

541 Even so, the court should assess the reliability of the victim's statements in the light of the relevant circumstances (see also Murphy 2005, pp. 288ff.).

542 Although some civil-law countries deploy lay judges to a limited extent in civil proceedings (e.g., the German *Arbeitsgericht* consists of one professional judge and two lay judges (Janssen & Croes 2005, pp. 23-24)), this does not influence the admissibility of hearsay evidence in such proceedings.

543 Cf. Art. 163 of the Dutch Rv and Art. 396 of the German ZPO.

than submit their statements as *de auditu* evidence. As a result, the victim is able to furnish information about the three intended exceptions to the principle of confidentiality in civil law.

8.3 The Position of the Mediator and the Professional Caregiver

8.3.1 Criminal Law

Apart from the victim, the mediator and the professional caregiver can also become involved in criminal proceedings that follow a failed diversionary mediation, or a mediation that was part of regular court proceedings.[544] In such proceedings, the role of the mediator and the professional caregiver will mainly be a minor one.

The mediator and the professional caregiver can participate in a criminal trial as experts and as witnesses. As such, they can submit information in court as evidence. The guiding role of mediators in mediation, as well as their impartial and independent position, implies that they should maintain a certain distance *vis-à-vis* the parties and the case. From this it follows that mediators should in principle not furnish mediation information of their own accord, but only when they are obliged by law to do so. This also goes for professional caregivers, due to their supporting role during the session.

The procedural position of the mediator resembles that of the professional caregiver to a large extent. What will be said below about the mediator therefore equally applies to the professional caregiver, unless indicated otherwise.

In the course of criminal proceedings, mediators can be requested to give their expert opinion. In this capacity, they can be asked to give their view on a particular matter based on their expertise. Experts who are approached by the court and consent to give their opinion are obliged to cooperate and to provide the services requested. Among others, this holds true for Germany,[545] the Netherlands,[546] and the United Kingdom.[547] In this respect, the expert's position is different from the witness's, who cannot refuse to make a statement (unless a privilege to refuse to testify applies). Despite some differences, the position of the expert to a large extent resembles that of the witness. One of these differences is that hearsay statements submitted

544 The third type of victim-offender mediation is not applicable here, for reasons specified earlier.
545 Eisenberg 2006, pp. 496ff.
546 Nijboer 2008, p. 237.
547 Murphy 2005, pp. 346-347.

by an expert are initially admissible as evidence in lay proceedings.[548]

In the context of a criminal trial that follows a victim-offender mediation, it is not very likely that the mediator and the professional caregiver will be approached as experts; the mediation information they may be able to provide is not related to their special expertise, but to the fact that they were professionally involved in the mediation concerned. However, mediators may in theory be asked for their expert view, for example, on the course of events during the mediation, or on whether there were sufficient opportunities for the parties to come to an agreement. Professional caregivers may be asked for their opinion about the party they have supported, depending on their area of expertise. For instance, probation officers who assisted the offender during the mediation can be asked for their expert view on the offender's rehabilitation potential, and on the risk of recidivism.

Due to the similarities between the position of the expert and that of the witness, the following *mutatis mutandis* also applies to the mediator and the professional caregiver that act as experts.

The mediator and the professional caregiver can also be called as witnesses in criminal proceedings. The regulations pertaining to witnesses discussed in Section 8.2.1 then apply. If mediators are called as witnesses, and are questioned about the contents of the mediation, they should only disclose mediation information that pertains to the three exceptions.

Hearing the mediator as a witness is most likely to follow the testimony of the victim that included the disclosure of the mediation information concerned. For example, if the victim stated that the offender threatened him or her during the mediation, the mediator may subsequently be questioned to confirm or disprove the victim's assertion. Also, the mediator may be heard if the offender claims wrongful disruption of the mediation process, following the investigation of the court into the victim's allegation that the offender intentionally failed to comply with the mediation agreement. In such cases, the defence may react to the victim's claim by asserting that the offender was induced by unfair means to consent to the mediation agreement, and was consequently unable to fulfil the resulting obligations. The mediator may then be asked to shed light on the course of events. If the mediator is called as a witness before the victim has testified, or if the victim chose not to mention the fact that, for example, the offender talked about other crimes during the mediation, the mediator should in principle not disclose this information. After all, the main rationale behind the exceptions to the confidentiality rule is the drawbacks such statements can have for the

548 The reason for this is that experts usually include their findings in a written report. If such reports were considered inadmissible hearsay, the expert report would in many cases be excluded, for example, when the report contains a reproduction of the expert's examination of the offender. See also Murphy 2005, pp. 341ff. On the admissibility of expert evidence in general, see also Roberts & Zuckerman 2004, pp. 305ff.

victim, and allowing disclosure aims at remedying these disadvantages. When the victim apparently does not need to make use of this remedy, since he or she does not disclose the information concerned and thus gives priority to observing the confidentiality rule, the mediator should not overrule this decision. This also follows from the mediator's impartial and independent position *vis-à-vis* the mediation parties.

The mediator who is called as a witness, has a legal duty to appear and to make a statement. A conflict between the mediation's confidential nature and the obligation to give testimony may be resolved by including the principle of confidentiality and its exceptions in legislation (see further Section 8.2.1). The mediator would then be able to refuse to testify about issues that are outside the scope of these exceptions. The same goes for mediators who have agreed to give their expert view on the case; they would also be able to withhold their professional opinion regarding such issues. Furthermore, the legal incorporation of the required level of secrecy of mediation information may prevent mediators from being requested to include information in their report for the criminal justice authorities that should remain confidential (see below).[549] The hearsay rule applies equally to mediators that appear as witnesses.

It follows that mediators may reveal that offenders committed another crime during the mediation, or that they revealed information about other crimes. Confessional statements of the offender and statements about an intentional implementation failure may also be disclosed (see Section 8.2.1).

The position of professional caregivers may differ from that of mediators, since they may have been awarded a legal privilege to refuse to testify. If this is the case, professional caregivers are able to refuse to give testimony about matters they have learned in the course of their professional duties in order to guarantee their accessibility and reliability.[550] The professional caregiver, who assists the victim or the offender during the mediation, may have been granted the privilege. For example, probation officers have been awarded the legal privilege, insofar as offering assistance to their clients is concerned. However, they cannot refuse to give evidence about issues that pertain to the part of their job that concerns gathering information to produce a report, or to inform the authorities.[551] Probation officers that assisted the offender during the mediation may therefore refrain from making a statement if they are called as witnesses during court hearings. Nevertheless, many professionals that can be present during a victim-

549 However, this does not alter the fact that the criminal justice authorities should observe the requirement to only be informed of the steps taken and the outcome of the mediation. If one of the exceptions occurs, it should primarily be discussed in court.

550 See Chapter 4.3.5.2.

551 F.J. Fernhout, *Het verschoningsrecht van getuigen in civiele zaken*, Maastricht: Gianni 2004, pp. 232-233.

offender mediation have thus far not been granted a legal privilege. For example, victim support volunteers and social workers cannot refuse to give testimony based on a privilege.[552]

If privileged professional caregivers are questioned about mediation information pertaining to the situations the exceptions apply to, the issue arises whether they should invoke their privilege. Such circumstances may, for example, occur if an offender committed another crime during the mediation, and the probation officer who assisted the offender during the session is interviewed about this event. The decision to ignore the privilege is left to the discretion of the professionals. They should weigh the consequences of disclosure against those of maintaining secrecy. Since the principle of confidentiality should only be breached in situations that cause serious harm to the victim and the mediation process, professional caregivers may decide to disclose such matters in court in spite of their legal privilege. What adds to this is that the statement of the professional caregiver may be necessary to substantiate a claim of the victim that one of the exceptions to the principle of confidentiality applies. However, if the victim chooses not to present such information, the professional caregiver should exercise restraint, for the reasons mentioned above.

It has been questioned whether mediators should be awarded a legal privilege to refuse to testify, so they may observe the confidential nature of victim-offender mediation. Nevertheless, few jurisdictions have adopted such regulations pertaining to the power of the mediator in penal cases;[553] in most cases, the mediator does not qualify for a legal privilege. After all, in many cases, mediators do not have to comply with mandatory legal qualifications to practise their profession, nor are they subject to sector-related disciplinary law. The title of mediator is generally not protected by law. Furthermore, although mediators should receive training, training programmes are scarcely standardised or obligatory. Finally, the voluntary nature of the participation of the victim and the offender in mediation indicates that the mediator's clients – the victim and the offender – are not obliged to seek the assistance of the mediator.

Consequently, it is questionable whether the mediator should be awarded a legal privilege to refuse to testify, based on the criteria that were discussed in Chapter 4.3.5.2. Another reason not to grant the privilege to the mediator is that this may deprive the victim of the opportunity to prove that one of the exceptions to the confidentiality rule applies. For example, it is possible that an offender confessed during the mediation to the victim of rape that he was aware of the latter's unwillingness to have sexual intercourse, but withdraws this confession during the court hearing, or invokes his right to remain silent. If the victim then submits the offender's confession in court,

552 See Chapter 4.3.5.2.

553 An example can be found in Art. 555 of the Belgian WvSv, which states that mediators cannot disclose information they have learned in the performance of their profession.

since it can be categorised under the confessional statements exception, the mediator's statement may be necessary in order to substantiate the victim's assertion. In this respect, the mediator's position differs considerably from that of the privileged professional caregiver; the latter offers assistance to one of the parties, and can as a result assist that party by either invoking or ignoring the privilege. However, if the mediator could invoke a legal privilege, situations as mentioned here may give rise to a conflict of interests, due to the mediator's impartiality *vis-à-vis* the parties. After all, refusing to give evidence may disadvantage the victim, while leaving the privilege aside may support the case against the offender. It is therefore advisable to seek another way to guarantee the observance of mediation confidentiality to the extent necessary. Including the principle of confidentiality and its exceptions in legislation may be such a solution. Statutory incorporation would constitute a uniform and clear arrangement, applying to all mediation participants equally.

The Council of Europe Recommendation identifies two additional duties for the mediator to provide mediation information. In the first place, Paragraph 30 of the Recommendation requires the mediator to convey any information about imminent serious crimes, which may come up in the course of the mediation, to the appropriate authorities or to the persons concerned. According to the Explanatory Memorandum to the Recommendation, this allows the mediator to comply with obligations resulting from national law.[554] After all, domestic law in many cases demands that citizens report crimes that they have knowledge of, for example, if these crimes endanger national security.[555] The proposed exception to the principle of confidentiality regarding other crimes also concerns such serious and imminent crimes, but additionally pertains to less serious crimes and crimes that happened prior to the mediation; the mediator's reporting duty which follows from the Recommendation would thus be extended to such events by the exception. If mediators are asked whether such issues occurred, they will be free to report these. However, if victims do not present information involving the exceptions of their own accord, the mediator should exercise restraint, unless the other crimes the offender talks about concern 'imminent serious crimes'. Mediators must then observe their duty to report such issues; after all, the rationale behind the mediator's reporting duty is to prevent serious harm or damage,[556] and it should therefore be complied with, even if the victim remains silent about such issues.[557]

554 Explanatory Memorandum to the Recommendation, p. 33. See also Chapters 3.5.2 and 6.2.1.

555 For example, such legislation can be found in the Netherlands (Corstens 2008, p. 79), and Belgium (Verstraeten 2005, pp. 63-64).

556 Explanatory Memorandum to the Recommendation, p. 32.

557 This also goes for the other mediation participants, insofar as the national statutory duty to report serious crimes applies to them.

The second obligation for the mediator to disclose mediation information follows from Paragraph 32 of the Council of Europe Recommendation, which stipulates that the mediator should inform the criminal justice authorities about the steps taken during the mediation, and about the outcome, to enable the authorities to decide on how to proceed. The mediator will usually comply with this requirement prior to the court hearing of a case. The report should not reveal the contents of the mediation session, nor should it express any judgement on the parties' behaviour during the process. Consequently, the mediator will generally not encounter problems regarding the principle of confidentiality in this respect. However, if the criminal justice officials request for additional information (for example, to build a stronger case against the offender), the relationship with the mediator may become strained; the mediator should after all observe the principle of confidentiality to the extent necessary, but is also dependent on the authorities for the referral of cases.[558] It is therefore essential to provide clarity on what exceptions to the confidentiality rule should be allowed.

8.3.2 Civil Law

The mediator and the professional caregiver can become involved in civil litigation that is started after a victim-offender mediation has ended. It is most likely that these proceedings are initiated by the victim to sue the offender for compensation. All types of victim-offender mediation can be followed by a civil action, if the damages were not settled in mediation or by the criminal court.[559] The assisting and guiding position of the mediator and the professional caregiver during the mediation implies that their role in civil court will be a minor one. They will mainly offer supporting evidence of the parties' claims pertaining to the contents of the preceding mediation session.

Because of the nature of their involvement in mediation, and due to the fact that the civil proceedings will in most cases focus on a claim for compensation, the mediator and the professional caregiver are unlikely to act as parties in civil litigation that follows a victim-offender mediation. Consequently, the main procedural positions of both professionals are those of experts and witnesses.

The mediator and the professional caregiver can be requested to give their expert opinion by the parties in civil proceedings. If they honour the request to state their views, they are obliged to cooperate. This holds true for Belgium,[560] the Netherlands,[561] Germany,[562] and the United Kingdom.[563]

558 In this respect, see also K. Lauwaert, *Herstelrecht en procedurele waarborgen*, Apeldoorn/Antwerp: Maklu 2008, pp. 235-237 and 305ff.
559 In this respect, see Section 8.2.2.
560 Arts. 962-991bis of the Belgian GW.

Hearsay statements made by experts are generally admissible.[564] In other respects, the position of the expert in civil proceedings to a large extent resembles that of the witness. The discussion of the latter's position below therefore *mutatis mutandis* also applies to the expert.

Experts are generally requested to state their views on particular matters based on their expertise. Both the mediator and the professional caregiver can be approached as experts (cf. the examples mentioned in Section 8.3.1). In civil law, it is more likely that the mediator and the professional caregiver are summoned as witnesses, rather than acting as experts, for the same reasons as mentioned above regarding criminal law.

The position of the mediator and the professional caregiver as witnesses is therefore the most important in the context of civil law. As parties, the victim and the offender can summon them to give testimony in the process of taking evidence. If the parties disclose information from the mediation as party witnesses, they may even rely on the possibility to hear the professional caregiver or the mediator to support their assertions, because of the restricted conclusive force of party testimonies. For example, victims may need the mediator's deposition to confirm the allegation that offenders have committed another crime, especially since it is probable that offenders cannot be questioned about this, as they can invoke a privilege to refuse to testify based on the right against self-incrimination. Offenders can, for instance, question the probation officer that assisted them during the session to prove that they did their best to reach an agreement with the victim, but that the victim adopted an unreasonable attitude, which caused the mediation to fail. Due to the assisting and guiding role of the mediator and professional caregiver during the mediation, they should in principle exercise restraint in disclosing mediation information (see also Section 8.3.1 regarding criminal law). In civil proceedings, however, these professionals will only disclose mediation information at the request of the victim or the offender, since they cannot present information of their own volition in civil court.

The regulations that apply to the position of the mediator and the professional caregiver as witnesses were largely discussed in Section 8.2.2 pertaining to the role of the victim in civil proceedings. They are in principle under a legal obligation to give testimony. To enable these professionals to respect the confidential nature of the victim-offender mediation, it would be advisable to include the principle of confidentiality in legislation. In addition, to guarantee that they can disclose information pertaining to the three exceptions, and thereby substantiate the claim of the victim that one of the exceptions occurred, the possibility to talk about other crimes,

561 Arts. 194-200 of the Dutch Rv.
562 Arts. 402-414 of the German ZPO. See also Baumbach *et al*. 2008, pp. 1527ff.
563 Murphy 2005, pp. 346-347; and Keane 2006, pp. 572ff.
564 Murphy 2005, pp. 340-341.

confessional statements, and intentional implementation failures, should also be safeguarded legally. Furthermore, the statutory recognition of the confidentiality rule and its exceptions enhances clarity and uniformity, and avoids forum shopping.

Section 8.2.2 discussed the admissibility of depositions of witnesses and party witnesses pertaining to mediation information in civil proceedings. The remarks made there equally apply to the testimonies of the mediator and the professional caregiver. As a result, information about another crime having been committed during the mediation, and some information about an implementation failure is generally permitted as non-hearsay evidence. Information about confessional statements of the offender, about other crimes, and the remaining issues concerning an implementation failure, are also admissible despite the fact that they may be qualified as hearsay evidence. However, it remains important that the victim or the offender requesting the mediator or professional caregiver to provide such information attempts to summon the maker of the original statement. Due to the nature of the exceptions to the principle of confidentiality, this will in most cases be the offender; however, since offenders can in some cases invoke a privilege to refuse to testify based on the right against self-incrimination, victims may have to rely on the mediator and the professional caregiver to support their claim. Naturally, the party who furnishes hearsay evidence of previous statements of the mediator or professional caregiver should preferably question these professionals directly.

The mediator and the professional caregiver that are requested to give testimony are in principle obliged to make a statement. If the principle of confidentiality and its exceptions were incorporated in legislation, they could observe mediation confidentiality to the extent necessary and consequently abstain from answering questions that are outside the scope of these exceptions. However, some professional caregivers may be awarded a legal privilege to refuse to testify, allowing them not to give testimony about matters they learned in the course of their duties.[565] As a result, the possibilities for victims and offenders to take evidence regarding the mediation contents from the professional caregiver who supported them may differ according to the professional caregiver's ability to invoke a privilege. This also depends on whether professional caregivers who are awarded a privilege are obliged to invoke their privilege. As is the case in criminal law, this decision is generally left to the discretion of the professional. This means that they should assess the effects of giving testimony *vis-à-vis* the consequences of refusing to do so. Since the proposed exceptions to the principle of confidentiality concern situations that have severe drawbacks for the victim, professional caregivers may, in such cases,

565 The remarks that have been made in this respect regarding criminal law (Section 8.3.1) also apply here.

decide to make a statement in spite of their privilege, especially since their statement may be necessary to substantiate the victim's claims. For example, if the victim testifies as a party witness that the offender has threatened him or her during the mediation, the offender may refuse to make a statement about this event so as not to incriminate himself. The mediator and the professional caregiver are the only ones that can offer the necessary support of the victim's allegation, also because a party-witness statement has a restricted conclusive force.

In Section 8.3.1 on criminal law, it was already mentioned that it has been questioned whether mediators should be granted a legal privilege based on their profession. Although the mediator who mediates in civil disputes is granted a legal privilege in a few countries,[566] the mediator who was involved in a victim-offender mediation, and who is subsequently called as a witness during related civil proceedings, is in most cases not awarded the privilege. The reason for this is that the mediator generally does not have to comply with mandatory legal qualifications. Nor is he subject to sector-related disciplinary law. Furthermore, uniform training programmes for mediators are scarce, and not always compulsory.

It therefore remains questionable whether mediators in penal cases should be granted a privilege regarding their involvement in civil proceedings. If the principle of confidentiality and its exceptions were included in legislation, awarding such a privilege might be unnecessary; the statutory right to refuse to disclose mediation information in court if it exceeds the proposed exceptions would enable the mediator to observe mediation confidentiality. Incorporating the confidentiality rule in legislation would also prevent victims from being unable to substantiate their claims that one of the exceptions occurred. After all, if mediators were granted a privilege, they might suffer a conflict of interests if victims were to ask them to furnish evidence about the behaviour of offenders during the mediation, because of the mediator's impartial and independent position during the session. A legal provision concerning the type of mediation information that is open to disclosure would avoid this situation, and would provide a uniform and

566 For example, in Belgium (see above) and the United States. The American Uniform Mediation Act (UMA) awards the mediator a privilege and requires that federal States safeguard this in their legislation (Art. 4 UMA, and P.D. Johnson, 'Confidentiality in Mediation: What Can Florida Glean from the Uniform Mediation Act?', *Florida State University Law Review* 2003-3, p. 492). An example of this can be found in Article 1121 of the California Evidence Code. In other countries, such as France, the mediator can only be questioned if the parties agree to this (N. Baas, *Mediation in civiele en bestuursrechtelijke zaken*, The Hague: WODC 2002, p. 33; and M. Pel, La médiation judiciaire in Frankrijk. De wettelijke regeling in Frankrijk vergeleken met de projectmatige aanpak in Nederland', *Tijdschrift voor Mediation* 2001-2, p. 30). Nevertheless, awarding the legal privilege to mediators in civil disputes remains a topic of discussion (among others, see M. Pel & M.A. Vogel, *Mediation en vertrouwelijkheid*, The Hague: Sdu Uitgevers 2005, pp. 81ff., and pp. 150ff. on the topic of awarding the legal privilege to mediators in civil cases in the Netherlands and the United States, respectively). See also Chapter 4.4.4.1.

clear arrangement that applies to all participants in victim-offender mediation. This would furthermore prevent inequality pertaining to the position of the professional caregivers that offered assistance during the mediation, since not all of them are awarded a legal privilege.

8.4 The Position of the Offender

8.4.1 Criminal Law

If diversionary mediation fails, or if the offender participated in victim-offender mediation as part of regular court proceedings, the offender will be brought to trial after the mediation has ended.[567] Criminal proceedings aim at establishing the offender's legal guilt or innocence; as a result, it should be noted that the offender should really be considered the alleged offender or the accused during the preliminary investigation and the hearing of the case in court.

The previous chapters examined the compatibility of making exceptions to the principle of confidentiality with the main features of criminal law – which largely concern the rights that follow from the notion of a fair trial. Breaching the confidentiality rule in the three situations identified proved to be consistent with the concept of a fair trial, as long as the necessary procedural requirements are met. These requirements influence the offender's position pertaining to furnishing information during a criminal trial. For example, the right to an oral hearing and the right to defend oneself in person entitle the alleged offender to make a statement in court.[568] Consequently, offenders are able to disclose mediation information of their own volition and to react to the disclosure of such issues by the victim (for example, offenders may want to rebut the victim's claim that they have intentionally frustrated the implementation of the mediation agreement).[569] The offender's right to speak is not absolute; it can be restricted on appeal, and by national law (for example, offenders can be prosecuted if their statements include matters that constitute an offence). Another fair-trial requirement that affects the offender's position in court is the right to remain silent, which can be deduced from the right against self-incrimination.[570] Offenders cannot be forced or obliged to make a statement that may support the criminal charge against them. Under certain circumstances, the court can

567 Since the third modality of mediation takes place after conviction and sentencing, this type of victim-offender mediation will not be followed by criminal proceedings.

568 See Chapter 4.3.2.2 and references there.

569 Or by one of the other mediation participants. The opportunity to react to statements made by the other mediation participants also follows from the right to adversarial proceedings (Chapter 4.3.2.1).

570 See Chapter 4.3.2.3 and references there.

draw adverse inferences from the offender's decision to remain silent. The court can also take a cooperative attitude of offenders into consideration, such as their demeanour towards the victim.

Consequently, the offender has the opportunity to choose whether or not to make a statement in criminal court, which can include mediation information. With regard to the disclosure of information from a mediation, the right to remain silent allows offenders to observe the principle of confidentiality; since they cannot be obliged to make a statement, they cannot be compelled to disclose mediation information. The right of speech allows offenders to present any information they want. The question arises whether the offender can be restricted in exercising this right with regard to the disclosure of mediation information.

The first situation to be discussed concerns the disclosure of information by the victim pertaining to the three proposed exceptions; information about another crime, a confessional statement by the offender, or an intentional implementation failure. The right to a fair trial allows offenders to react to the victim's assertions that these situations occurred; they may either confirm, or refute the statement of the victim. Offenders can also exert their right to remain silent. For example, if the victim claims that the offender threatened the victim during the mediation, the offender can decide to neither confess nor deny this allegation for strategic reasons. Such a response does not prejudice the confidentiality of the preceding mediation, since the offender does not make a statement about mediation issues. In addition, problems regarding the confidentiality rule are not to be expected if the offender confirms the victim's claims; if the offender confesses to threatening the victim, this will in principle not cause the disclosure of mediation information that should remain secret. However, it is likely that the offender will want to rebut the victim's allegations. After all, the exceptions mainly concern offender misconduct, and their disclosure may well have an adverse effect on the offender's case and may increase the sentence. If offenders want to challenge the victim's allegations, they may need information from the mediation that does not concern the three exceptions. For example, if a victim states that he has been threatened by the offender during the mediation, the offender may refute this statement by saying that he was provoked to do so by the victim, because the victim said that he would make sure that everyone would know what the offender did to him. Technically, such a statement by the victim cannot be categorised under one of the exceptions. It should therefore be questioned whether the offender should be allowed to substantiate the rebuttal of an allegation of the victim with mediation information that exceeds the intended exceptions to the principle of confidentiality; that is, if the victim is right in arguing that one of the exceptions has occurred.

Making exceptions to the confidentiality rule – and thereby allowing disclosure of the information concerned – aims at offering a remedy for the

harm that is caused by the occurrence of the situations that these exceptions relate to. The effectiveness of allowing disclosure in violation of the principle of confidentiality depends on the court's possibilities to take this information into consideration. The main features of criminal law should be observed and the necessary procedural requirements should be met. Among other things, this means that offenders have the right to properly defend themselves against allegations of the victim that pertain to events that occurred during the mediation, as also follows from the right to adversarial proceedings. Consequently, the offender should be allowed to raise any objections to a claim that one of the exceptions occurred, even if this means that mediation information that exceeds these exceptions is disclosed in court. This additionally applies if offenders are requested by the court to give their opinion about the victim's claim; since the occurrence of an exception can influence the sentencing decision of the court, it should be able to investigate the victim's claim that this is the case. In the course of such an investigation, the court may need information that is outside the scope of the exceptions, for example, when the court investigates the victim's claim that the offender intentionally violated the mediation agreement. The court should then be able to look into the realisation of the agreement, and question the offender accordingly. Offenders should then be able to include all mediation information in their statement that is relevant to dispute the victim's allegation.

The second situation pertains to offenders disclosing information of their own accord. The right to an oral hearing and the right to defend oneself entitle the offender to make a statement in criminal proceedings. Offenders are free to include information regarding the exceptions in their statement, as the victim is. However, as the information that is open to disclosure mainly concerns issues that may have an adverse effect on the offender's case, it is unlikely that an alleged offender will reveal that an exception has occurred. Apart from this, the question remains whether the offender should be allowed to talk about mediation information which does not pertain to the exceptions.

The disclosure of such information may benefit the offender's position in court. One of the main reasons for offenders to participate in victim-offender mediation may be that it gives them the opportunity to show their goodwill with an eye to remission. A successful mediation may induce the court to take these results into consideration regarding their sentencing decision. Offenders may therefore have an interest in disclosing to the court that the behaviour of the victim terminated the mediation procedure. If they can demonstrate that they genuinely attempted to compensate the victim, offenders should not be denied the benefits of taking part in mediation if the

victim has behaved in a way that frustrated the session.[571] This is also connected to the voluntary nature of the parties' participation; to ensure that no pressure is exerted on the victim to participate in mediation, the consequences for the offender of a refusal by the victim should not be substantially greater than the consequences of participating in victim-offender mediation would be.[572] The same should apply to the victim's ability to withdraw from the mediation process at any time without consequences; offenders should then also remain able to enjoy the benefits of mediation, as long as they can prove that they have sincerely tried to make amends. Offenders should therefore be allowed to argue in court that the termination of the procedure was not their fault, even if this entails the disclosure of mediation information outside the scope of the exceptions. The same is true if the disclosure of other information from the mediation may have evidential benefits for the offender. For example, if the victim and the offender were involved in a bar fight, the victim may also be to blame for what has happened. When the victim admitted this during the mediation, the offender should be allowed to refer to this admission in court, if this demonstrably benefits his procedural position in court. Allowing offenders to disclose relevant mediation information of their own accord also facilitates the fact-finding process, which is one of the main features of criminal law.

However, this does not mean that this approach may not have drawbacks. The category of information the offender may present in this context cannot be delineated clearly. There is a risk that the information presented by the offender gives rise to an endless debate about whose fault it was that the mediation failed, whether the offender made a serious attempt to compensate the victim, and so on. Nevertheless, available alternatives have disadvantages of their own. The above-mentioned problem may be avoided by denying any effect of the outcome of a mediation on the severity of the sentence or the amount of damages, except for a possible negative effect due to the occurrence of the proposed exceptions. This would render the disclosure of additional information by the offender useless, but it would also eliminate the appeal for offenders to participate in mediation, since its result would no longer have the potential to mitigate the outcome of a criminal trial. Another option is to assume that only a mediation that resulted in an agreement can have a positive effect on the court's sentencing

571 An example of this can be found in Germany. Article 46a of the German Criminal Code (*Strafgesetzbuch*, StGB) states that the perpetrator is entitled to a reduced sentence if he has completely or substantially made restitution for his act or earnestly strived to make restitution (the original German text reads '*seine Tat ganz oder zum überwiegenden Teil wiedergutgemacht oder deren Wiedergutmachung ernsthaft erstrebt*').

572 Cf. the European Forum for Victim Services in its *Statement on the Position of the Victim within the Process of Mediation* (2004). According to the European Forum, the above implies that, if a diversion from the criminal justice process is considered, an alternative diversionary measure should be available to ensure that the victim is not pressured into taking part.

decision. However, victims might not feel free to withdraw from the mediation process, since by aborting the process they would deprive the offender of the beneficial effects of a successful mediation. The proposed solution of allowing offenders to present additional mediation information if this evidently furthers their case seems to remove these obstacles for the most part. Nevertheless, in view of the above, it is crucial that the court closely monitors whether the information revealed by offenders in this context actually benefits their procedural position, and that it intervenes when the debate seems to spiral out of control. Otherwise, the general confidential nature of victim-offender mediation as well as the defined exceptions to this rule are at risk of being undermined. If the court is of the opinion that the information presented by offenders cannot in any way further their position in the proceedings, it can decide to leave this information out of the official deliberations (see further Section 8.2.1).

Apart from the above, it remains possible that the victim and the offender agree on the disclosure of particular mediation information. For example, the defence may want to stress the offender's cooperative attitude during the mediation, and tell the court that the offender gave the victim flowers at the end of the mediation. If the mediation ended successfully, the victim may agree to this. In such cases, this information can be furnished in court, even though it may go beyond the proposed exceptions to the confidentiality rule. If the defence submits evidence, the hearsay rule applies in equal manner.[573]

8.4.2 Civil Law

If a victim-offender mediation is followed by civil litigation, the offender is most likely to act as a party in such proceedings. The most probable situation is that the offender is sued by the victim for damages. Again, civil proceedings may follow all types of victim-offender mediation, but are most likely to be initiated if the topic of compensation is not settled during the mediation or in criminal proceedings, and the amount claimed is substantial. Since such proceedings will be started by the victim, the offender is most likely to become involved in civil litigation as the defendant. The procedural positions of the defendant and the plaintiff are largely similar with regard to their options to furnish information in court. The following explanation will therefore briefly recapitulate the implications of the offender's position as a party for his options to submit mediation information. A detailed discussion of these issues can be found in Section 8.2.2 pertaining to the victim.

An offender who becomes a party in civil proceedings can give testimony as a party witness. Party witnesses are generally subject to the same regulations

573 See Section 8.2.1. On the subject of hearsay evidence tendered by the defence, see also Murphy 2005, pp. 197ff.

as regular witnesses, and if they are called to testify they will be obliged to appear before the court and to make a statement. Although violation of this duty is not punishable, the court may draw adverse inferences from a failure to comply with this obligation. Offenders should therefore observe this statutory duty, both when they give testimony as a party witness of their own accord and when they are summoned by the victim.

If offenders are summoned as a party witness by the opposing party (the victim), they are obliged to give testimony. This implies a significant difference from their position in criminal proceedings; under civil law they can consequently be required to make a statement under oath, whereas under criminal law, offenders have a right to remain silent. Only when making a party-witness statement carries the risk of self-incrimination, they can decline to give evidence.[574] Since victims should attempt to hear the original maker of a statement instead of furnishing hearsay evidence, if they claim that one of the exceptions occurred, it is likely that the offender will be called as a party witness. In individual cases, it may then be important for offenders to carefully consider whether they should invoke this privilege to refuse to testify, assuming that they can. Facts or claims that are not challenged by the parties should be accepted by the civil court (see also Chapter 4.4.1). The question arises what should happen if, for example, the victim claims that the offender has attacked him or her during the mediation, as a ground for claiming more compensation. The offender may then turn down the request from the victim to give testimony about this issue, so as not to incriminate himself. However, the civil-law principle that undisputed facts or claims should remain unchallenged may imply that the court should then decide to accept the victim's allegation as a certainty, since it is not rebutted by the offender. This may be a reason for the offender not to invoke the privilege, but to make a statement concerning the victim's assertion. Moreover, it may be significant for the offender to react to the claim of the victim, because the victim's statement in principle has limited conclusive force due to the victim's position as a party witness; if the victim's claim is refuted, the victim will need other evidence to support his or her statement, and may additionally have to summon the mediator or the professional caregiver as a witness.

To enable the testifying offender to observe the confidential nature of victim-offender mediation to the extent necessary, it would again be advisable to include the principle of confidentiality and its exceptions in legislation. However, there are two situations in which the offender should be allowed to disclose additional information. In the first place, the offender should be able to react properly to a claim by the victim that one of the intended exceptions has occurred. This follows from the right to adversarial proceedings, which requires that the parties should be given sufficient

574 See, e.g., Keane 2006, pp. 624-637.

opportunity to react to each other's claims and assertions. A violation of this right could endanger the fairness of the proceedings, and thus the admissibility of the information concerned. The offender must therefore be able to react to allegations made by the victim, even if this reaction includes the disclosure of mediation information that exceeds the proposed exceptions. For example, the victim may claim that the offender has failed to pay the compensation the parties agreed upon in mediation, and that the offender thus intentionally violated the agreement. The offender may then argue that he considers the amount of compensation to be too high, but that he felt compelled to accept it during the mediation, due to the intimidating attitude of the victim during the session.

The second situation pertains to the disclosure of mediation information of the offender's own accord. As was discussed regarding criminal law, offenders should be able to denounce behaviour of the victim that frustrated the mediation, when they themselves have adopted a constructive attitude during the session. This is important to allow the victim to participate in victim-offender mediation, or to withdraw from the process without consequences. The discussion of obstructive victim behaviour may well explain why offenders, for example, accepted a level of compensation they ultimately objected to, and therefore failed to pay. If this caused the victim to go to court, the offender should be able to talk about these issues, even though they cannot be considered to constitute one of the proposed exceptions in all cases. Although such information can no longer influence the court's sentencing decision, it may influence the decision of the court on the level of compensation the offender has to offer.

The discussion of the admissibility of mediation information as hearsay and non-hearsay evidence in Section 8.2.2 equally applies here. If offenders want to furnish proof about previous statements of the victim, they should rather summon the victim as a party witness than furnish the latter's statements as hearsay evidence.

Apart from the above-mentioned possibilities, the offender and the victim can also disclose mediation information that is outside the scope of the three exceptions, if they agree on the disclosure of such issues.

8.5 Conclusion

The previous chapters addressed several exceptions that should be made to the current confidential environment of victim-offender mediation. These exceptions concern the situation that the offender commits another crime during the mediation or discloses information about other crimes, confessional statements by the offender, and information about an intentional implementation failure of the mediation agreement. Due to the drawbacks that these situations may have for and the harm they may cause

to the victim and the mediation process, the mediation participants should be enabled to disclose these issues in criminal and civil proceedings. To guarantee the effectiveness of allowing disclosure, it is also important that the court can take these matters into consideration. Therefore, the mediation participants should have the opportunity to present such information in court. Additionally, this information should be admissible. These issues have been discussed in this chapter.

The victim, the mediator, the professional caregiver, and the offender may all have different positions in criminal or civil court, and their opportunities to participate in such proceedings influence their ability to submit information pertaining to the proposed exceptions to the confidentiality rule.

The victim has an effective opportunity to present the information that pertains to the exceptions to the principle of confidentiality during criminal proceedings. The various procedural positions of the victim can fulfil during a criminal trial – facilitating the offender's prosecution, injured party, maker of a VIS, and witness – mean that the victim can disclose information from a mediation concerning the three exceptions to the confidentiality rule. If plea bargaining is involved, the most important way for victims to be heard is to issue a VIS; this enables them to tell their story, even if the offender is not on trial. If it does come to a trial, the most important role of the victim is that of a witness. Although victims in this position are dependent on others to ask them about what happened in mediation, it is likely that the prosecution will ask them about the mediation, especially if one of the proposed exceptions has occurred; this may help the case against the offender. Victims can generally include the information pertaining to these exceptions in their testimonies, and the criminal court can subsequently take this information into account. To enable the victim to limit the disclosure of mediation information to these issues, it is advisable to codify the principle of confidentiality and the exceptions, thereby ensuring greater clarity and uniformity.

The mediator and the professional caregiver can participate in a criminal trial as experts and witnesses. Due to the nature of their involvement, their position as witnesses is the most important here. As such, they can present mediation information in court. To enable the mediator and the professional caregiver to observe the principle of confidentiality, and to disclose information that pertains to the three exceptions, mediation confidentiality should be included in legislation to the extent necessary. This will also prevent problems pertaining to the legal privilege to refuse to testify.

Offenders have two main options for furnishing mediation information in criminal court. In the first place, they can rebut the victim's claim that one of the exceptions to the confidentiality principle occurred. In such cases, the offender may submit information that is outside the scope of these exceptions. The same applies if offenders produce proof of their own accord; mediation information that exceeds the exceptions can then be disclosed, as

long as this demonstrably benefits the offender's position in court.

As a party in civil litigation against the offender, the victim can present information pertaining to the intended exceptions to the principle of confidentiality as a party witness, either at the request of the other party, or of his own volition. The information concerned can subsequently be taken into account by the civil court. To enable the victim to observe mediation confidentiality to the extent necessary, it is advisable to incorporate the principle of confidentiality and its exceptions in legislation.

The mediator and the professional caregiver in civil proceedings can act as experts and as witnesses. Both positions allow them to submit mediation information in court if asked to do so. Their position as witnesses is the most important in this respect. To enable the mediator and the professional caregiver to observe the principle of confidentiality, it is proposed that the confidentiality rule and its exceptions be laid down in legislation. This will offer them a clear and uniform basis to substantiate the parties' claims that one of the exceptions occurred, and prevent problems pertaining to a legal privilege.

Offenders are also most likely to act as parties and can subsequently appear as party witnesses. In that capacity, they can either be requested to give testimony by the victim, or make a statement of their own accord. Offenders in this context would also benefit from codification of the confidentiality rule and its exceptions. Furthermore, offenders should be allowed to furnish mediation information that is outside the scope of these exceptions, so as to rebut the victim's claim that one of the exceptions occurred, or to prove to the court that the failure of the mediation was not their fault.

In conclusion, the mediation participants can be considered to have an effective opportunity to disclose mediation information in court, regarding one of the intended exceptions. Making exceptions to the principle of confidentiality seems to be a proper way of offering a remedy for the harm that is caused by the situations these exceptions pertain to. Codification of the principle of confidentiality and its exceptions can be argued to be a suitable and indeed crucial measure.

PART FOUR

CONCLUDING OBSERVATIONS

9 The Scope of the Principle of Confidentiality

9.1 Introduction

The research presented in this book investigated one of the main features of victim-offender mediation, the principle of confidentiality. Confidentiality is a generally acknowledged critical success factor for the procedure. It offers victims and offenders a possibility to freely share their cares and concerns in order to try and come to terms with each other and the crime that has happened.

The recognition of the significance of the secret nature of the mediation process has led to the incorporation of the confidentiality standard in international protocols, which offer a set of guiding principles for victim-offender mediation. According to the wording of these international documents, all things said and done during the mediation should remain secret.[575] This broad scope of confidentiality was chosen as the starting point of this research to determine whether strict secrecy of all mediation information is a tenable and realistic requirement. The research showed that absolute secrecy can in some cases be counterproductive. Particular frictions may arise, which can have severe drawbacks for the mediation participants and erode the process itself. When this happens, the observance of mediation secrecy can and should be questioned. Specific conflict areas may necessitate breaching confidentiality and were therefore identified as possible exceptions. In this way, the research endeavoured to throw light on the advisable scope of the confidential character of victim-offender mediation and to translate this into concrete limitations on the confidentiality rule in the form of clear exceptions. In so doing, the research formulated an answer to the central question to what extent, and on what grounds, exceptions should be made to the private nature of victim-offender mediation.

The frictions that arise from the premise that all mediation information is subject to secrecy occur in two areas: the social environment of the mediation participants and their involvement in judicial proceedings that follow the mediation. As a result, making exceptions implies that the participants are either allowed to disclose mediation information to out-of-court third parties, or submit mediation information in court. The reasons for permitting disclosure differ accordingly, as do the possible consequences of revealing the information concerned. The conclusions pertaining to both areas will therefore be discussed separately below. With this, the current chapter will give an overview of the main research findings, and answer the

575 Except for when the parties agree to disclose particular issues, or when domestic law requires disclosure (Paragraph 2 of the Recommendation and Paragraph 14 of the Basic Principles).

central research question.

9.2 Confidentiality and Out-of-Court Disclosure

The friction that pertains to the out-of-court setting concerns the issue that the participants in mediation are unable to share their experiences with their social environment. This environment consists of all third parties that may potentially be addressed regarding mediation contents, because the participants want to talk to them, or because they have their own interests in receiving mediation information. These third parties are divided into three categories: the family and friends of the participants, the media, and a third category which consists of a variety of institutions. The type of victim-offender mediation concerned is of little significance in this context and they were therefore discussed collectively. Consequently, only the first part of the research framework developed in Chapter Four – concerning the main features of victim-offender mediation – was taken into account.

The main reasons for requiring that mediation participants do not talk about their mediation experiences to third parties correspond to the general grounds for advocating the confidentiality of victim-offender mediation communication: maintaining the appeal of taking part and facilitating the exchange of information between victims and offenders. Furthermore, it prevents information from being in the public domain and assuming a life of its own. Despite these advantages of observing confidentiality, frictions occur if mediation participants are forbidden to talk to any third parties.

Social studies have demonstrated that sharing significant information with supportive others, for example, close friends and relatives, has a positive effect on the health and wellbeing of individuals.[576] Victims and offenders may conceivably experience their encounter in mediation as an important and agitating event, and they may feel isolated if they are unable to talk about what happened during the session with people close to them. In the victim's case, this may even cause feelings of secondary victimisation. Prohibiting the parties in mediation to discuss the process with their family and friends can therefore have a negative impact on their overall wellbeing. For these reasons, it may be a disincentive to participate; although mediation secrecy safeguards the appeal of participation, it can also be counterproductive if it is carried too far. Furthermore, participation in mediation should at the very least not add to the parties' distress. As victims and offenders can be considerably disadvantaged by a general ban on disclosure to their social environment, such a ban should not be absolute. Victims and offenders should be allowed to talk to their friends and family about their mediation experiences.

Due to the nature of the involvement of the mediator and the professional

576 For references, see Chapter Five.

and non-professional caregiver, the above does not apply to these participants. For the non-professional caregivers, this follows from their modest involvement and their readiness to support one of the parties. The professional character of the participation of the mediator and the professional caregiver implies that they should observe mediation confidentiality by virtue of their professional involvement, unless they have a legal duty to disclose particular information. Of course, they are allowed to discuss a mediation they were involved in with their superior(s) or co-worker(s), if this is considered necessary in the terms of professional quality assurance. In addition, it can neither be excluded, nor can it be verified, that professionals talk to some people close to them about the mediation (this also applies to the non-professional caregiver). Nevertheless, the general rule must be that the mediator and the professional and non-professional caregiver are not allowed to talk to their social environment about the mediation.

None of the participants in victim-offender mediation should be able to talk about what happened in mediation to the media. The revelation of such information by victims and offenders is most likely to be inspired by motives such as frustration or vengefulness. A ban on talking to third parties inspired by such motives will not have the same drawbacks that a ban on disclosure to family and friends may have. On the contrary, acting on vengefulness is believed to have negative consequences for the overall wellbeing of individuals.[577] It is also inconsistent with the objective of victim-offender mediation, to reach an agreement based on acknowledging the needs and feelings of the other party. The parties should therefore not be allowed to share their experiences with the media. For the reasons mentioned above, the same goes for the professional and non-professional caregiver and the mediator.

The third category of potential recipients consists of a variety of institutions that are part of the environment of the mediation participants, such as schools, sports clubs, and insurance companies. For various reasons, they may be interested in receiving mediation information. Victims and offenders can agree that some issues are open to disclosure to these institutions. If they do not, the decision to reveal information is left to the discretion of the party concerned (in most cases the victim). An aggrieved party may seek redress through civil litigation. The mediator and the professional and non-professional caregiver should honour the confidential nature of victim-offender mediation.

577 For references, see Chapter Five.

9.3 Confidentiality and Disclosure in Court

The frictions that pertain to the legal setting were discussed in Chapters Six, Seven and Eight. Making an exception to the principle of confidentiality because of the consequences of these frictions implies that the participants in victim-offender mediation are allowed to disclose mediation information in judicial proceedings. As this requires conformity with both mediation fundamentals and essentials of criminal law and civil law, the entire research framework (see Chapter Four) should be taken into account.

The first issue concerns the reasons that necessitate making an exception. The first ground is that participation in mediation should not add grief to the parties' distress. If the premise that all mediation information is confidential has severe drawbacks, a remedy should be sought. Such a remedy can be offered by leaving the rule that causes these drawbacks aside. In this context, this entails the formulation of exceptions to the principle of confidentiality. Consequently, some mediation information should be open to disclosure in court.

Exceptions can only be considered effective if they truly offer the persons harmed an opportunity to be and feel heard. Exceptions must therefore be compatible with the main characteristics of victim-offender mediation. After all, breaching the confidentiality rule should not subvert the process itself without good reason. The measure of allowing disclosure was therefore tested against the relevant mediation characteristics.

Secondly, the effectiveness of the remedy of permitting disclosure depends on whether the information concerned can be submitted in court. It should be admissible under criminal and civil law, and should therefore not violate the essential features of these concepts. This enables the criminal and civil court to take notice of the behaviour of the offender and to draw the conclusions it sees fit. In the research framework, this aspect was divided into two parts, consisting of the main features of criminal law and civil law, and of the current limitations on the use of information in these areas.

The final step pertains to the possibility of the mediation participants to furnish information in court. For the court to be able to pay attention to the issues that can be disclosed, these issues should not only be admissible, but they should also actually be advanced. The examination of the effectiveness of making exceptions was therefore concluded with a discussion of the procedural position of the mediation participants.

The steps mentioned above were examined for all three types of victim-offender mediation (diversionary mediation, mediation as part of regular court proceedings, and mediation after conviction and sentencing).

9.3.1 Identification of the Frictions

Based on the idea that victim-offender mediation – and its standards – should at the very least not have additional drawbacks for its participants,

three situations were identified that could necessitate making an exception to the confidentiality rule. The nature of the identified frictions indicates that the victim will generally be the disadvantaged party.

The first situation pertains to other crimes. This can concern another crime the offender commits during the mediation against the same victim. Naturally, this will be a very harmful and distressing event for the victim. Furthermore, offenders may reveal information about other (past and future) crimes. The knowledge that others may soon be victimised may disturb the victim. According to the advocated extent of the principle of confidentiality, the victim is currently unable to disclose such issues in court.

The second category of mediation information that should possibly be open to disclosure concerns confessional statements of the offender. Prior to the mediation, victims and offenders should acknowledge the basic facts of a case. In many cases, this acknowledgement will imply a confession by the offender. It is also possible that acknowledging the basic facts does not constitute an admission of guilt, but that other statements of the offender in the course of the mediation do. The offender is free to withdraw a previous confession during judicial proceedings that follow a mediation. Understandably, this may lead to feelings of frustration and incomprehension on the victim's part. Furthermore, the withdrawal of a confession made in mediation does not correspond to the rationale of the process. The confidentiality of such statements should therefore be questioned.

The third situation concerns a failure to implement the mediation agreement, due to intentional and reprehensible behaviour of the offender. The fulfilment of the obligations in the agreement can be considered the ultimate recognition of the victim and the harm suffered. The failure of the offender to comply with the agreement can cause the victim to feel frustrated and distressed, and even to suffer feelings of secondary victimisation. The mediation participants should therefore possibly be able to furnish information regarding an intentional implementation failure in court.

The identified frictions add to the parties' distress, especially so for the victim. A remedy could be offered by allowing the victim and the other mediation participants to reveal the situations concerned and the corresponding information in court. Such a remedy must, of course, be effective and therefore be compatible with the features of victim-offender mediation and of criminal and civil law.

9.3.2 Compatibility with Features of Victim-Offender Mediation

The guiding principles for victim-offender mediation follow from the Council of Europe Recommendation and the United Nations Basic

Principles.[578] The relevant standards are the acknowledgement of basic facts, the free and voluntary consent to participate, and the right to receive sufficient information prior to the mediation. These characteristics have various implications for victims and offenders, and for their role in mediation. In the first place, the acknowledgement of basic facts contributes to mutual consensus on the main issue of the mediation, the crime, and enables offenders to accept and act on their responsibilities towards the victim. Secondly, the requirement that the parties should decide to take part in mediation voluntarily and free of pressure presupposes that their consent to participate implies that they intend to commit themselves to contributing to the success of the procedure. This also follows from the fact that victims and offenders are free to withdraw from mediation at any time. The requirement pertaining to the parties' right to information points to their awareness of their roles in the process. The offender ought to be conscious of the victim's vulnerable position and act accordingly. Additionally, the information provided enables them to make a carefully considered decision about their participation.

It follows that victims and offenders taking part in victim-offender mediation are presupposed to make a conscious decision to participate and consequently intend to contribute to the success of the procedure. As a result, a violation of these requirements implies that their commitment can no longer be guaranteed.

If the offender commits another crime during the mediation or divulges information about other crimes, this behaviour may understandably harm the victim and frustrate the mediation process. Such behaviour – an intentional disruption of the procedure – does not correspond to the implications of the mediation features discussed above, but rather violates these requirements; offenders that consciously cause harm to the victim do not show that they acknowledge the victim's position or intend to contribute to the mediation's success.

Offenders should also accept and act on their responsibilities. The acknowledgement of basic facts is the most significant manifestation in this regard. The withdrawal of that acknowledgement after the mediation, as well as of other confessional statements, is inconsistent with this and thus violates the nature of mediation.

The same goes for an intentional implementation failure of the mediation agreement. The observance of the mediation requirements implies that offenders commit themselves to contributing to the success of the procedure. This includes compliance with the mediation agreement. Failing to fulfil the resulting obligations violates the essence of mediation, especially since offenders can withdraw from the process at any time, and consequently do not have to consent to unreasonable demands of the victim.

578 See Chapters Three and Four.

As the main features of victim-offender mediation are violated by the identified frictions, making exceptions to the principle of confidentiality in these situations will not subvert the mediation procedure itself.

9.3.3 Compatibility with Features of Criminal and Civil Law

The relevant features of criminal and civil law mainly follow from the right to fair proceedings. For exceptions to the confidentiality rule to offer an effective remedy, these features must be observed when mediation information is disclosed in court. Otherwise, it will be inadmissible and the court will be unable to consider it. The main relevant characteristics of criminal law are the right against self-incrimination, the presumption of innocence, and various procedural rights that follow from the right to adversarial proceedings. Regarding civil law, the most important characteristics are also the right to adversarial proceedings and the ensuing procedural requirements. Disclosure of information to which the exceptions could apply should comply with these essential features to the extent necessary.

As for criminal law,[579] none of the relevant features is inconsistent with the admissibility of mediation information in court. Prior to mediation, offenders should be informed about the implications of taking part, such as the scope of the confidentiality principle. The parties will then be aware beforehand what information is open to disclosure, the confidentiality rule notwithstanding. Offenders will know that some information they share during a mediation – for example, about another crime – can be revealed afterwards. The use of such information in criminal proceedings therefore does not violate the right against self-incrimination; the offender knows in advance that particular behaviour or specific information may be open to disclosure after the mediation has ended. The confidential environment does not alter this. So as not to infringe the presumption of innocence, the participation of an offender in mediation must not be regarded as an admission of guilt in subsequent proceedings; the offender's guilt must be established by the court on the basis of evidence produced by the prosecution or the defence.[580] Offenders are therefore free to withdraw their acknowledgement of the basic facts and other confessional statements made in the context of mediation. In this way, the *presumptio innocentiae* is observed, even if the other mediation participants submit confessional

579 The assessment of compatibility with criminal law only applies to the first and second modalities of victim-offender mediation, since the third modality takes place after the conviction and sentencing of the offender, and is thus not followed by criminal proceedings.

580 Unless the jurisdiction involved allows plea bargaining and the offender pleads guilty. Then, however, the decision to do so should be made by the offender of his own volition, and not be deduced from the offender's participation in victim-offender mediation.

statements. Nor does the right to adversarial proceedings conflict with submitting mediation information, as long as the necessary procedural requirements are observed, such as the right of the defence to examine and cross-examine witnesses.

If victim-offender mediation is followed by civil litigation,[581] mediation information may be relevant to the parties to substantiate their claims, and the relevant features of civil law should be observed for such information to be admissible. The main characteristic in this respect is the right to adversarial proceedings, which encompasses various procedural safeguards that should be observed in the course of taking evidence. For example, the parties in civil proceedings should have equal opportunities to submit their claims and furnish proof. They should also be enabled to react to each other's claims and assertions.

It follows that the essential features of criminal and civil law do not clash with the use of mediation information in court. Thus far, making exceptions to the principle of confidentiality can therefore be considered a sufficient remedy.

9.3.4 Similarities to Exceptions to the Use and Admissibility of Information

The use and admissibility of information in criminal and civil law is in some cases restricted. Observing the confidentiality of all mediation information is a similar limitation, since it also prohibits the use of information that might be relevant to judicial proceedings. Similarities between the reasons for the existing limitations and the proposed exceptions to the principle of confidentiality could therefore be considered an incentive not to allow disclosure.

The limitations pertaining to criminal law are the restricted use of coercive powers, the privilege to refuse to testify, and the exclusionary rule. The privilege to refuse to testify and the exclusionary rule are also recognised in civil law. Additionally, in civil law the conclusive force of the testimony of party witnesses is limited.

These restrictions do not stand in the way of making exceptions to the principle of confidentiality. Since communication in mediation is voluntary, the restriction pertaining to the coercive powers does not apply; coercive powers are by definition exerted against the will of the subject. The same goes for the exclusionary rule, because the disclosure of the mediation information concerned does not violate essential features of criminal or civil law (see above), nor is it otherwise obtained illegally. The remaining

581 Such civil proceedings are most likely to be initiated by the victim to sue the offender for damages. Civil litigation can be initiated after all three types of victim-offender mediation, but will generally follow a failed diversionary mediation, or a mediation that was part of regular court proceedings (provided that neither the mediation nor the criminal court settled damages).

limitations are irrelevant here, since they concern the question *who* can submit information in court,[582] instead of *what* information is admissible, which is the central question here.

In conclusion, the existing restrictions to the use of information in judicial proceedings do not give cause to refrain from making exceptions to the principle of confidentiality.

9.3.5 Procedural Position of the Mediation Participants

Making exceptions to the principle of confidentiality aims at offering a remedy for the harm that has been caused by the three situations that justify making an exception. For the mediation participants to perceive this remedy as effective, they should be able to submit the information concerned in court. Apart from the fact that this information should therefore be admissible in subsequent judicial proceedings (see above), the mediation participants should also be able to actually submit it in such proceedings. Breaching mediation confidentiality in particular situations would be pointless if the mediation participants could not put the information concerned to good use. The participants have different positions in judicial proceedings (whether criminal or civil), and their opportunities to present information diverge accordingly.

In criminal proceedings, the victim can facilitate the prosecution of the offender, join the proceedings as the injured party, make a victim impact statement,[583] or appear as a witness. Appearing as a witness is the most important position in this context, since it offers the victim the opportunity to make a sworn statement about the mediation information that is open to disclosure. Witnesses in criminal law are legally obliged to appear and to testify. As a result, the victim currently cannot refuse to answer questions about the mediation, even if these are outside the scope of the proposed exceptions. A solution should therefore be sought to enable the victim and the other participants to observe mediation confidentiality to the extent necessary, despite this statutory duty (see Section 9.3.6).

Witnesses can report on facts and circumstances that they observed or experienced themselves. Consequently, the victim can generally furnish proof that the offender committed another crime during the mediation. The same goes for information about the implementation failure exception, as far as these matters concern sensory perceptions of the victim. Other out-of-court statements that are reproduced by victims in their testimony may be considered hearsay evidence. This holds true for information about other crimes the offender divulges during the mediation, confessional statements

582 See Section 9.3.5.

583 This statement is of special importance if plea bargaining is involved, because it enables victims to state their experiences and views at the sentencing stage.

of the offender, and information regarding an intentional implementation failure that cannot be regarded as non-hearsay evidence.[584] Hearsay evidence is in principle inadmissible in common-law countries and in lay procedures in civil-law countries. However, there are many exceptions. One of these regards confessions, which in this context are taken to mean any statement that may be adverse to the person who made it. As a result, confessional statements that the offender made during the mediation as well as information about other crimes can be categorised as such. Such information is therefore admissible despite the hearsay rule. The remaining hearsay information, namely that regarding an implementation failure, remains inadmissible, but if the original statements concerned were made by the mediator or the professional caregiver, they can be summoned as witnesses. If the offender made the original statement, he or she can also be heard, but may refuse to make a statement by invoking the right to remain silent. Nevertheless, since only part of the implementation failure information will be considered hearsay, and part of that category may be provided directly by the mediator and the professional caregiver, the victim has a reasonable opportunity to disclose this information as well.

The mediator and the professional caregiver can join criminal proceedings as witnesses and as experts. Due to the nature of their involvement in mediation, it is most likely that they are requested to give testimony. In that capacity, they are able to furnish mediation information in court. Due to their guiding and assisting role during the process, they should, however, exercise restraint if the victim decides not to submit information pertaining to the exceptions. The statutory duty to give testimony also applies to the mediator and the professional caregiver, unless – in the case of the professional caregiver – a privilege to refuse to testify has been awarded on professional grounds. The decision to make a statement is then left to the discretion of the professional caregiver.[585]

In a criminal trial, offenders stand accused. Consequently, they have certain powers, which emanate from the fair-trial requirements, such as the right to remain silent and the right to speak. Offenders can choose whether to make a statement in criminal court, but cannot be obliged to do so. If offenders exercise their right to remain silent, they logically observe confidentiality. Furthermore, the right to speak gives offenders the opportunity to present the information they want. In the first place, the offender is allowed to react to the victim's claim that an exception occurred. The fair-trial requirements dictate that the offender should be permitted to rebut the victim's claim with any mediation information he considers necessary, even if this information is outside the scope of the exceptions. Offenders can also make a statement of their own accord. They are allowed to disclose mediation information pertaining to the exceptions, although this

584 For examples of these categories, see Chapter 8.2.1.

585 The assessment the professional caregiver should make was discussed in Chapter 8.3, with regard to both criminal law and civil law.

is unlikely since these situations may conceivably have an adverse effect on their case. Additionally, offenders should be allowed to disclose other mediation information if it demonstrably benefits their position in court, for instance, information that may lead to a reduced sentence, or that has evidential value.[586]

Civil proceedings that follow a victim-offender mediation are most likely to be initiated by the victim, who sues the offender for damages. The victim then becomes the plaintiff. As a party in civil litigation, victims are responsible for furnishing proof of their claims. They may need mediation information to do so. Parties in civil proceedings can give testimony themselves as party witnesses. Party witnesses are generally subject to the same regulations as regular witnesses are, which implies that they have a legal obligation to make a statement and answer the questions asked truthfully. However, the statement of a party witness has limited conclusive force, so as to guarantee its reliability. Since the statement of witnesses under civil law must also pertain to their own sensory observations, the victim can present information about other crimes and about an implementation failure, for the same reasons as mentioned above. In addition, civil law also recognises the concept of hearsay, but in this context it does not oppose furnishing mediation information pertaining to the other proposed exceptions.

In civil litigation, the mediator and the professional caregiver can be requested to give their expert opinion, or be called as witnesses. As witnesses, they are subject to the statutory duty to appear before the court and to make a statement. They will generally be summoned by the parties (the victim or the offender), and may be questioned about the contents of the mediation. Both professionals should then be allowed to disclose information pertaining to the proposed exceptions. If the professionals concerned have been awarded a legal privilege to refuse to testify, they must decide for themselves whether they will invoke their privilege.

The position of the offender in civil law *mutatis mutandis* resembles that of the victim. In most cases, the offender will be the defendant. As such, the offender can give testimony as a party witness, and offer mediation information. An important difference with the position of offenders in criminal law is that they can be obliged to make a statement on oath if the victim summons them to testify, unless they risk self-incrimination. As the defendant, the offender should also be allowed to disclose mediation information that exceeds the exceptions, either in reaction to the victim's claim that one of the exceptions occurred, or to denounce behaviour of the victim that frustrated the mediation session.

It follows that the mediation participants have ample opportunity to be heard in court and to disclose mediation information in legal proceedings.

586 For examples, see Chapter 8.4.1.

However, it is also true that when the mediation participants act as witnesses, they are currently unable to observe mediation confidentiality to the extent necessary; under criminal and civil law, witnesses are obliged to make a statement if summoned to do so. Making exceptions to the principle of confidentiality is pointless if the secrecy of the remaining mediation information cannot be guaranteed. This discrepancy must be resolved in order to secure the effectiveness of the remedy of disregarding the confidentiality rule.

9.3.6 Incorporation in Legislation

If the offender commits another crime during a mediation, provides information about other crimes, or intentionally violates the mediation agreement, this will have drawbacks for the victim. This also true if the offender confesses in the context of mediation, but withdraws the statements concerned afterwards. For these reasons, exceptions to the current scope of mediation confidentiality are called for. Making exceptions to the confidentiality rule in the above-mentioned situations was shown to be compatible with the essential features of penal mediation, and of criminal and civil law. Additionally, the mediation participants can be considered to have sufficient opportunities to submit the information concerned in court. In most cases, they will do so as witnesses.

In criminal and civil law, witnesses are generally subject to a legal obligation to appear and to make a statement. They may find themselves unable to refuse to answer questions about mediation information that is outside the scope of the proposed exceptions. Some professional caregivers may be privileged to refuse to testify, which may lead to inequality; for example, a probation officer who assisted the offender can under certain circumstances invoke a privilege, while a victim services worker cannot. Moreover, the privilege is currently scarcely awarded to mediators, who could obviously benefit from being able to refuse to give testimony. However, granting the privilege to these professionals may confront mediators with a conflict of interests in view of their impartial role in mediation. Another disadvantage of the current state of affairs is the risk that the statutory duty to testify is misused to make mediation information public.

As a result, the mediation participants must be allowed to keep mediation information secret, despite the legal obligation to appear as witnesses. It would therefore be advisable to include the principle of confidentiality in legislation. The confidentiality of the mediation process would be legally guaranteed, and the statutory incorporation of the confidentiality rule would constitute an exception to the general obligation to give testimony. It should be included in criminal law, because it would restrict one of its main features, namely the fact-finding process. Such a limitation should be foreseeable and unequivocal. Civil legislation should also incorporate

confidentiality; apart from the fact that both legal areas require witnesses to make a statement, forum shopping – if the confidentiality rule would have a legal basis under criminal law but not under civil law – should be avoided.

To ensure that the mediation participants can disclose information pertaining to the three proposed exceptions, it is important that they are covered by legislation too. As the identified exceptions reflect a careful weighing of the interests involved, the mediation participants should have the right to disclose this information.

The legal incorporation of the confidentiality principle and its exceptions will secure the best possible approach to the level of secrecy regarding the contents of mediation. It offers uniform regulation for all mediation participants and an effective remedy for confidentiality frictions.

The assessment whether an exception occurred should be left to the party that wants to submit the information concerned. In most cases, this will be the victim. Naturally, incorporation in legislation will help the parties to make a proper assessment, especially in combination with the recommendation that the parties should be provided with specific information prior to the mediation, about the available exceptions to the principle of confidentiality and the possible consequences of disclosure. The court in charge should determine whether advancing mediation information is consistent with the proposed regulation of the exceptions. If mediation information is disclosed in breach of this regulation, the most obvious response will be to leave the information out of the official deliberations. If the court considers it necessary or appropriate to do so, it may additionally award damages to the injured party, or mitigate the sentence to be imposed. In the context of civil law, the wronged party can sue for damages.

9.4 Epilogue

This study examined the principle of confidentiality that governs victim-offender mediation. The principle of confidentiality is an important prerequisite for successful mediation in criminal cases. Participation in penal mediation has significant benefits for victims and offenders. It affords them a unique chance to talk to each other about the crime that has happened, and to have a say in how issues are addressed or resolved. They can express their personal feelings and experiences in a way that is nearly impossible in a court setting. In this respect, the opportunities offered by victim-offender mediation have thus far not been surpassed.

Because of the advantages of victim-offender mediation, it is of great importance to carefully monitor the feasibility and tenability of the process. The need for basic principles is generally recognised, and they have been laid down as international guidelines. The widely supported acknowledgement that it is necessary to provide a private environment for penal mediation is an essential first step. To extend the potential of victim-

offender mediation for victims and offenders, further reflection on the practical implications of this premise is needed. Maximising the effectiveness of victim-offender mediation not only depends on fulfilling its basic principles, but also on the compatibility of the process with related areas and principles of law.

With this in mind, this research focused on identifying concrete situations where the observance of confidentiality would be untenable, due to its potential consequences. The aim was to offer food for thought about the next step in embedding victim-offender mediation in the areas the process inevitably interacts with, criminal law and civil law. In the end, it is hoped that a firmer foothold will enable more victims and offenders to profit from victim-offender mediation.

Samenvatting

Victim-offender mediation, bemiddeling tussen de verdachte en het slachtoffer van een strafbaar feit (verder: strafrechtelijke bemiddeling), wordt in toenemende mate ingezet als wijze van conflictoplossing in strafrechtelijke context. Tijdens een bemiddeling wordt aan de verdachte en het slachtoffer de mogelijkheid geboden om in dialoog te treden over hetgeen is voorgevallen, onder begeleiding van een onafhankelijke en onpartijdige derde, de *mediator*. De ontmoeting met de verdachte stelt het slachtoffer in staat tot uitdrukking te brengen welke gevolgen het strafbare feit voor hem heeft gehad. De verdachte heeft de mogelijkheid zijn verantwoordelijkheid ten aanzien van het gebeurde te nemen en het slachtoffer compensatie te bieden. Hoewel de aandacht voor strafrechtelijke bemiddeling groeiende is, is er weinig aandacht voor de verhouding tussen bemiddeling en 'traditionele' juridische procedures en daarmee voor de inbedding van dit concept in zijn juridische context. Een onderwerp ten aanzien waarvan deze benadering bij uitstek tot problemen leidt, is de vertrouwelijkheid van de inhoud van strafrechtelijke bemiddeling. De wijze waarop aan dit principe uitdrukking is gegeven in diverse internationale protocollen, laat weinig ruimte voor uitzonderingen op dit beginsel, ondanks het feit dat dit uitgangspunt nadelige effecten voor de betrokkenen kan hebben. Deze situatie, als verder beschreven in *hoofdstuk 1*, vormt de aanleiding voor dit onderzoek.

De wijze waarop aan strafrechtelijke bemiddeling op nationaal niveau is vormgegeven, is afhankelijk van de specifieke kenmerken van de verschillende rechtssystemen. *Grosso modo* zijn er drie modaliteiten te onderscheiden, afhankelijk van het moment dat een bemiddeling plaatsvindt ten opzichte van het strafproces; een zaak kan voor, tijdens en na een strafprocedure naar bemiddeling worden verwezen (zie *hoofdstuk 2*). In het eerste geval legt de vervolgende instantie een aanbod tot bemiddeling voor aan het slachtoffer en de verdachte, voordat de zaak bij de rechter wordt aangebracht. Wanneer slachtoffer en verdachte tijdens de bemiddeling tot overeenstemming komen, wordt de vervolging niet voortgezet en de zaak als afgedaan beschouwd. Strafrechtelijke bemiddeling functioneert in deze gevallen als een vorm van buitengerechtelijke afdoening. Hieruit volgt dat met name vergrijpen van lichte aard naar deze modaliteit worden verwezen. In het geval de feiten zich naar hun ernst niet lenen om slechts door bemiddeling te worden afgedaan, kunnen de verdachte en het slachtoffer tijdens de behandeling van de zaak ter terechtzitting worden verwezen naar bemiddeling. Een positieve uitkomst kan dan een matigend effect hebben op de straftoemetingsbeslissing van de rechter. De derde modaliteit van bemiddeling vindt plaats na de veroordeling van de verdachte, vaak tijdens de tenuitvoerlegging van een gevangenisstraf, en is derhalve met name gereserveerd voor zware feiten. Deze vorm van strafrechtelijke bemiddeling kan de uit-

komst van het strafproces niet langer beïnvloeden en is daarom minder gericht op het bereiken van een overeenkomst.

Het toenemend gebruik van bemiddeling in strafzaken heeft geleid tot de ontwikkeling van minimumvereisten waaraan de procedure moet voldoen. Deze vereisten zijn geformuleerd door zowel de Raad van Europa[587] als de Verenigde Naties.[588] Beide internationale protocollen bevatten richtlijnen waar nationale bemiddelingsprocedures aan moeten voldoen (zie *hoofdstuk 3*). Zo dient er voorafgaand aan de bemiddeling overeenstemming te bestaan tussen verdachte en slachtoffer over de basale feiten waar de bemiddeling betrekking op heeft. Deelname moet zijn gebaseerd op vrijwilligheid. Met het oog daarop dienen partijen van tevoren te worden geïnformeerd over de implicaties van hun deelname. Verder bevatten bovengenoemde protocollen onder andere een recht op juridische bijstand. Ook moet worden gewaarborgd dat er geen grote ongelijkheid tussen de partijen bestaat. Daarnaast moeten er trainingsmogelijkheden geboden worden aan *mediators*. Tijdens de bemiddeling dienen *mediators* zich onpartijdig en onafhankelijk op te stellen. Verder noemen de protocollen het belang van de beschikbaarheid van bemiddeling tijdens de verschillende fasen van het strafproces, en het belang van het feit dat beslissingen in het kader van bemiddeling zo spoedig mogelijk worden genomen. Ook het principe waar dit onderzoek betrekking op heeft, het vereiste van vertrouwelijkheid, is in beide internationale documenten opgenomen. Op grond van de betrokken bepalingen is de inhoud van een strafrechtelijke bemiddeling aan geheimhouding onderhevig. De belangrijkste redenen hiervoor zijn het waarborgen van de aantrekkelijkheid voor het slachtoffer en de verdachte om deel te nemen, en het bevorderen van vruchtbare interactie tijdens de bemiddeling. Bovendien vereist het private karakter van bemiddeling geen publieke toegankelijkheid om redenen van kwaliteitsbewaking vergelijkbaar met het strafproces. Beide internationale documenten maken verder een voorbehoud op het vertrouwelijke karakter van bemiddeling, te weten wanneer verdachte en slachtoffer overeenkomen dat bepaalde informatie openbaar mag worden gemaakt. De basisprincipes van de Verenigde Naties voegen hieraan toe dat het vertrouwelijke karakter van strafrechtelijke bemiddeling ook kan worden doorbroken wanneer nationale wetgeving dit vereist.

De wijze waarop bovengenoemde protocollen het vertrouwelijkheidsbeginsel hebben verwoord, is gekozen als uitgangspunt van dit onderzoek. Op basis hiervan is onderzocht wat de houdbaarheid is van het vertrekpunt dat alles wat wordt besproken tijdens een strafrechtelijke bemiddeling onderhevig is aan geheimhouding. Zijn er situaties die nopen tot het maken van

587 Recommendation R (99)19 concerning Mediation in Penal Matters Adopted by the Committee of Ministers (15 September 1999).

588 United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, 1-26 July 2002, Res/2002/12.

uitzonderingen? Een dergelijke benadering vereist een afweging tussen de belangen die worden gewaarborgd door de inachtneming van het vertrouwelijkheidsbeginsel en de belangen die worden geschaad door de geheimhouding van informatie in bepaalde situaties. Om deze belangafweging mogelijk te maken is in *hoofdstuk 4* een toetsingskader ontwikkeld. Dit toetsingskader bestaat uit drie pijlers: fundamentele kenmerken van strafrechtelijke bemiddeling zelf, en de essentialia van de concepten die zich bevinden op het speelveld van strafrechtelijke bemiddeling, te weten straf(proces)recht en civiel (proces)recht. Strafrechtelijke bemiddeling kan worden gevolgd door een strafprocedure (wanneer de eerste modaliteit van mediation niet leidt tot een overeenkomst, of in het geval van de tweede modaliteit) en een civiele procedure (vaak handelend over een vordering tot schadevergoeding), en informatie afkomstig uit bemiddeling kan derhalve voor beide typen procedures relevant zijn. Om die reden dienen de kenmerken van beide rechtsgebieden in bovengenoemde belangenafweging te worden betrokken.

De fundamentele kenmerken van strafrechtelijke bemiddeling, strafrecht en civiel recht begrenzen de belangenafweging die in het kader van dit onderzoek heeft plaatsgevonden. Het karakter van deze vereisten is dermate essentieel dat zij onder alle omstandigheden dienen te worden gewaarborgd. Indien het inachtnemen dan wel het doorbreken van het vertrouwelijkheidsbeginsel een van deze kenmerken schendt, vormt dit aanleiding juist wel of niet een uitzondering te maken op het geheime karakter van de inhoud van bemiddeling. De aspecten van strafrechtelijke bemiddeling die in dit verband van belang zijn, betreffen de erkenning van de basale feiten, de vrijwillige deelname aan het proces en het recht om toereikende informatie te ontvangen. Fundamentele kenmerken van het strafrecht betreffen het streven naar materiële waarheidsvinding en de rechten die voortvloeien uit het recht op een eerlijk proces, zoals neergelegd in artikel 6 EVRM en artikel 14 IVBP. Ook voor het civiele recht zijn deze bepalingen hier relevant. Daarnaast is de relatief actieve rol die aan partijen is toegekend van belang.

Op basis van bovenstaand toetsingskader zijn verscheidene situaties tegen het licht gehouden, die, wanneer de door de internationale richtlijnen voorgestane reikwijdte van het vertrouwelijkheidsbeginsel wordt gevolgd, tot fricties kunnen leiden die mogelijk nadelige consequenties voor de bemiddelingsdeelnemers hebben. Nu deelname aan bemiddeling in ieder geval niet moet leiden tot leedtoevoeging, dienen dergelijke consequenties zoveel mogelijk voorkomen te worden en, waar nodig, gecompenseerd. Een mogelijkheid tot dit laatste is de deelnemers aan bemiddeling toe te staan bepaalde informatie naar buiten te brengen en dientengevolge het vertrouwelijkheidsprincipe ten aanzien van deze situaties te doorbreken.

Hoofdstuk 5 betreft de buitengerechtelijke openbaarmaking van bemiddelingsinformatie en de frictie die mogelijk kan ontstaan wanneer dit de deelnemers niet is toegestaan. In deze context is alleen de eerste pijler van het

toetsingskader, betreffende de essentialia van strafrechtelijke bemiddeling, relevant. Op basis van de huidige interpretatie van het vertrouwelijkheidsbeginsel is het de deelnemers aan bemiddeling niet toegestaan met vrienden en familie, de media, en overige instellingen (zoals scholen, sportclubs en religieuze instituten) te spreken over de inhoud van de bemiddeling. Dit betekent in de eerste plaats dat het slachtoffer en de verdachte hun ervaringen niet mogen delen met hun naasten. Nu een dergelijk verbod een nadelig effect kan hebben op hun verwerkingsproces en welbevinden, en het opheffen van dit verbod geen noemenswaardige problemen voor de bemiddelingsprocedure met zich brengt, verdient het aanbeveling dat het slachtoffers en verdachten wordt toegestaan over hun ervaringen te praten met familie en vrienden. Dit geldt echter niet voor het openbaren van bemiddelingsinformatie aan de media. Het is onwaarschijnlijk dat een dergelijke onthulling noodzakelijk is voor het verwerkingsproces van verdachte en slachtoffer; het ligt eerder voor de hand dat zij handelen uit motieven met een meer negatieve connotatie, zoals wraak. Gezien het feit dat dergelijke drijfveren zich niet verhouden met het doel van strafrechtelijke bemiddeling, namelijk het bereiken van een overeenkomst met de ander op grond van de erkenning van diens gevoelens en behoeften, past het niet om het onthullen van informatie op grond van dergelijke beweegredenen toe te laten. De derde categorie potentiële geadresseerden wordt gevormd door overige instellingen uit de leefomgeving van verdachte en slachtoffer. Het kan in hun beider belang zijn bemiddelingsinformatie aan deze instellingen openbaar te maken. In deze gevallen kunnen de verdachte en het slachtoffer afspreken bepaalde informatie naar buiten te brengen. In het geval zij geen overeenstemming kunnen bereiken, ligt de beslissing om informatie toch te onthullen in beginsel bij de partij die dit voornemen heeft opgevat. De mediator en de (professionele) hulpverlener is het niet toegelaten met derden te spreken over de inhoud van een bemiddeling, behoudens de situatie dat zij binnen hun eigen organisatie hun ervaringen bespreken in het kader van kwaliteitsbewaking, of wanneer verdachte en slachtoffer hen hiertoe verzoeken.

De overige fricties die kunnen worden veroorzaakt door het vertrouwelijkheidsbeginsel, betreffen de juridische *setting*. Een uitzondering in deze context impliceert dat het de bemiddelingsdeelnemers is toegestaan informatie in te brengen in een straf- of civiele procedure. De doeltreffendheid van het maken van een uitzondering hangt daarom niet alleen af van de verenigbaarheid met de essentialia van strafrechtelijke bemiddeling, maar ook van de mogelijkheid om de desbetreffende informatie te bezigen in een gerechtelijke procedure. Om die reden dienen ook de tweede en derde pijler van het toetsingskader te worden betrokken in onderhavige afweging. Bovendien is het van belang dat de bemiddelingsdeelnemers een positie in het straf- en civiele proces kunnen innemen, die hen daadwerkelijk in staat stelt informatie naar voren te brengen. Na het bespreken van de verenigbaarheid van het maken van een uitzondering voor de afzonderlijke fricties met de essentialia

van de betrokken concepten in de *hoofdstukken 6* en *7*, zijn dan ook de posities van de verschillende bemiddelingsdeelnemers tijdens het straf- en civiele proces besproken in *hoofdstuk 8*.

Hoofdstuk 6 bespreekt een tweetal situaties die gerelateerd zijn aan de positie van de verdachte. Het betreft de mogelijkheid dat de verdachte zich tijdens de bemiddeling schuldig maakt aan een nieuw strafbaar feit ten opzichte van het slachtoffer, of informatie over andere strafbare feiten onthult. Gezien de huidige interpretatie die aan het vertrouwelijkheidsbeginsel wordt gegeven mag het slachtoffer dergelijke informatie niet openbaar maken, terwijl deze om begrijpelijke redenen een negatief effect op zijn welbevinden kan hebben. Daarnaast wordt de situatie besproken dat de verdachte tijdens de bemiddeling een bekentenis aflegt of dat de erkenning van de basale feiten een dergelijke verklaring inhoudt, maar deze tijdens de behandeling van de zaak ter terechtzitting herroept. Gezien het vertrouwelijke karakter van de inhoud van bemiddeling mag het slachtoffer dan niet naar buiten brengen dat de verdachte in de context van bemiddeling reeds heeft bekend. Ook dit kan voor het slachtoffer leiden tot gevoelens van onbegrip en frustratie.

Hoofdstuk 7 bespreekt de situatie dat de verdachte opzettelijk het implementeren van een bemiddelingsovereenkomst frustreert. Indien de redenen hiervoor terug te voeren zijn op de communicatie tijdens de bemiddeling, mogen deze niet openbaar worden gemaakt. Het vertrouwelijkheidsbeginsel heeft bovendien tot inspiratie gediend voor een bepaling in bovengenoemd protocol van de Verenigde Naties, dat stelt dat het niet-nakomen van de overeenkomst niet dient te leiden tot een zwaardere straf. Dit betekent dat het voor het slachtoffer op dit moment onmogelijk lijkt een mislukking van de overeenkomst in de rechtszaal aan de kaak te stellen. Gezien het feit dat het nakomen van de bemiddelingsovereenkomst door de verdachte kan worden gezien als de ultieme erkenning van het slachtoffer en diens behoeften, kan het frustreren hiervan een tegengesteld effect hebben en leiden tot secundaire victimisatie.

De raadzaamheid van het doorbreken van het vertrouwelijkheidsbeginsel in bovengenoemde situaties hangt in de eerste plaats af van de verenigbaarheid hiervan met de essentialia van strafrechtelijke bemiddeling. Uit de belangrijkste kenmerken (erkenning van basale feite, vrijwillige deelname en recht op informatie) volgt dat verdachte en slachtoffer worden verondersteld bewust de keuze te maken om deel te nemen. Dit impliceert derhalve dat zij zich verbinden de procedure tot een goed einde te brengen, en zich daarbij bewust zijn van hun rol binnen het proces en de positie van de ander.

Het plegen van een nieuw strafbaar feit tijdens de bemiddeling – of het onthullen van informatie over toekomstige of eerder begane strafbare feiten – lijkt echter niet te stroken met dit uitgangspunt noch met de veronderstelling dat de verdachte het slachtoffer tijdens een bemiddeling erkent en res-

pecteert, en voornemens is bij te dragen aan het bereiken van een overeenkomst. Het intrekken van een in de context van bemiddeling afgelegde bekentenis leidt tot eenzelfde conclusie. Nu bemiddeling niet kan slagen zonder dat de verdachte zijn verantwoordelijkheid neemt ten opzichte van het slachtoffer en het strafbare feit, staat het intrekken van een bekentenis die besloten ligt in de erkenning van de basale feiten of die daarbuiten ligt, opnieuw haaks op de grondslagen van strafrechtelijke bemiddeling. Ook een opzettelijke weigering om de overeenkomst na te komen is hiermee in strijd. Met de bewuste keuze bij te dragen aan het slagen van een bemiddeling verbindt de verdachte zich immers ook aan het vervullen van de daaruit voortvloeiende afspraken. De bemiddelingsessentialia verzetten zich derhalve niet tegen het maken van een uitzondering in de hier aangeduide situaties, nu deze alle een schending van fundamentele beginselen van bemiddeling inhouden.

De tweede stap in dit verband betreft de verenigbaarheid van het maken van een uitzondering met de essentialia van strafrecht en civiel recht, en daarmee het vaststellen van de toelaatbaarheid van de betreffende informatie in een juridische procedure. Deze essentialia verzetten zich niet tegen het doorbreken van de vertrouwelijkheid in bovengenoemde situaties. Gezien het feit dat het recht op informatie waarborgt dat de verdachte van tevoren op de hoogte is van het bereik van het vertrouwelijke karakter van bemiddeling, inclusief welke informatie onder omstandigheden mogelijk naar buiten mag worden gebracht, wordt het strafrechtelijke verbod van zelfincriminatie niet geschonden door het maken van een uitzondering. Hetzelfde geldt voor de onschuldspresumptie: hoewel deze vereist dat de schuld van de verdachte slechts wordt vastgesteld door de rechter, en de verdachte in dat kader een eerder afgelegde bekentenis in een later stadium mag intrekken, verzet de onschuldspresumptie zich niet tegen het bekendmaken van dergelijke verklaringen door het slachtoffer. Tot slot brengt het recht op een procedure op tegenspraak mee dat bepaalde procedurele vereisten bij het aanvoeren van informatie dienen te worden gerespecteerd. Deze laatste opmerking is ook van belang voor het civiele recht. Geen van de civielrechtelijke essentialia verzet zich tegen het gebruik van de betreffende bemiddelingsinformatie in een civiele procedure, zolang aan de uit het recht op tegenspraak voortvloeiende vereisten wordt voldaan.

Naast de verenigbaarheid met bovenstaande fundamentele kenmerken is tevens bekeken of de bestaande uitzonderingen op het gebruik van informatie in het strafrecht (wettelijke grenzen aan inzet van dwangmiddelen, verschoningsrecht, bewijsuitsluiting) en civiele recht (verschoningsrecht, beperkte bewijskracht partijgetuigenverklaring, bewijsuitsluiting) aanleiding geven om van het maken van uitzonderingen op het vertrouwelijkheidsbeginsel af te zien. Dit is ten aanzien van geen van de drie fricties het geval.

Het laatste aspect dat bepalend is voor het beoordelen van de doeltreffendheid van het doorbreken van het vertrouwelijkheidsbeginsel betreft de daadwerkelijke mogelijkheden van de bemiddelingsdeelnemers om zich uit te spreken of anderszins informatie aan te voeren tijdens een juridische procedure (zie *hoofdstuk 8*).

Afhankelijk van het geldende nationale recht kan het slachtoffer in het kader van het strafproces de vervolging van de verdachte initiëren, zich voegen als benadeelde partij, een *victim impact statement* maken en als getuige optreden. In deze laatste hoedanigheid kan het slachtoffer een verklaring onder ede afleggen over hetgeen tijdens de bemiddeling is voorgevallen. In dat geval heeft het slachtoffer de mogelijkheid over alle drie de fricties (te weten verdere strafbare feiten, een bekentenis, of een opzettelijke weigering aan de overeenkomst te voldoen) informatie naar voren te brengen. Eventuele beperkingen die voorvloeien uit het wisselende gewicht dat nationaal recht toekent aan verklaringen 'van horen zeggen' (*hearsay evidence*), limiteren deze mogelijkheden voor het slachtoffer niet noemenswaardig. Ditzelfde geldt voor de mediator en de hulpverleners die partijen mogelijk ondersteunen tijdens de bemiddeling. Het is ook mogelijk dat deze bemiddelingsdeelnemers worden aangezocht als expert. Echter, gezien hun directe betrokkenheid bij de voorafgaande bemiddeling is het meer waarschijnlijk dat zij als getuige worden gehoord. De verdachte heeft, op basis van de rechten die voortvloeien uit het recht op een eerlijk proces, tijdens het strafproces de mogelijkheid zich te beroepen op zijn zwijgrecht. Daarnaast heeft hij het recht zichzelf te verdedigen en een verklaring af te leggen. Op basis hiervan kan de verdachte de bewering van het slachtoffer dat een van de uitzonderingen zich heeft voorgedaan weerspreken, ook wanneer in dit kader informatie wordt aangevoerd die buiten het bestek van de voorziene uitzonderingssituaties ligt. Dergelijke informatie mag de verdachte ook uit eigen beweging naar voren brengen, wanneer dit hem aantoonbare procesrechtelijke voordelen oplevert.

In een civiele procedure die volgt op een strafrechtelijke bemiddeling, zullen het slachtoffer en de verdachte in de regel als procespartijen fungeren. Een van de mogelijkheden die hen dan ter beschikking staat om de uitgezonderde bemiddelingsinformatie naar voren te brengen, is het afleggen van een verklaring als partijgetuige. De status van partijgetuige brengt echter met zich dat zij in veel gevallen aanvullend bewijs nodig hebben om hun verklaring te ondersteunen. Evenals in de strafprocedure moet het de verdachte ook in de civiele procedure worden toegestaan zich te verweren tegen beweringen van het slachtoffer met informatie die buiten het bestek van de uitzonderingen ligt. De verdachte mag dergelijke informatie ook uit eigen beweging aanvoeren wanneer dit procesrechtelijke voordelen met zich brengt. De mediator en de hulpverlener kunnen ook tijdens een civiele procedure worden aangezocht als getuige en als expert.

Op grond van het bovenstaande blijkt dat de bemiddelingsdeelnemers afdoende mogelijkheden hebben om informatie naar voren te brengen tijdens

een juridische procedure van strafrechtelijke of civielrechtelijke aard, en derhalve in staat zijn om informatie betreffende de uitzonderingssituaties aan te voeren. Met name de positie van getuige is in dit verband van belang. In dit verband rijst echter een knelpunt. In het overgrote deel van de landen zijn getuigen in het straf- en civiele recht wettelijk verplicht te verschijnen en gestelde vragen te beantwoorden. Dit betekent dat bemiddelingsdeelnemers die optreden als getuige niet kunnen weigeren om vragen naar de inhoud van een bemiddeling, die het bestek van de uitzonderingssituaties te buiten gaan, te beantwoorden. Dit brengt het risico met zich dat het uitgangspunt van het vertrouwelijke karakter van strafrechtelijke bemiddeling in gevaar wordt gebracht, en ondergraaft de betekenis van dit beginsel. Ditzelfde geldt voor het nut van het maken van uitzonderingen hierop. Om tegenwicht te bieden aan deze wettelijke verplichting verdient het daarom aanbeveling het vertrouwelijkheidsbeginsel wettelijk te verankeren. Het zou dan een uitzondering vormen op de algemene verplichting voor getuigen om een verklaring af te leggen. In aanvulling hierop zouden tevens de drie voorgestelde uitzonderingen op het vertrouwelijke karakter van bemiddeling in wetgeving moeten worden gecodificeerd, teneinde de mogelijkheid voor de bemiddelingsdeelnemers om deze informatie te openbaren te garanderen. Op deze wijze wordt een uniforme regeling geboden, die verzekert dat het vertrouwelijkheidsbeginsel wordt gerespecteerd, terwijl tevens wordt gewaarborgd dat dit beginsel kan worden doorbroken voor zover dit noodzakelijk is. De beslissing om de vertrouwelijkheid te doorbreken rust in beginsel bij de partij die van mening is dat zich een uitzonderingssituatie heeft voorgedaan. Mocht de rechter vervolgens van oordeel zijn dat de desbetreffende informatie ten onrechte naar voren is gebracht, dan dient deze informatie verder buiten beschouwing te worden gelaten. Onder omstandigheden kan aanvullend een schadevergoeding worden toegekend aan de door de bekendmaking benadeelde partij.

In *hoofdstuk 9* worden de belangrijkste bevindingen van dit onderzoek op een rijtje gezet. In dit onderzoek is getracht de wenselijke reikwijdte van het vertrouwelijkheidsbeginsel in de context van strafrechtelijke bemiddeling af te bakenen. Het belang van vertrouwelijkheid van bemiddelingsinformatie wordt onderkend, en om die reden wordt in dit boek dan ook niet bepleit om dit beginsel te verlaten. Wel zijn enkele uitzonderingssituaties geïdentificeerd, waarin het gerechtvaardigd is het geheime karakter van de inhoud van strafrechtelijke bemiddeling te doorbreken. Om vast te kunnen stellen of deze situaties inderdaad nopen tot het maken van een uitzondering, en of dit daadwerkelijk compensatie biedt voor de veroorzaakte nadelen, is een toetsingskader ontwikkeld. Op basis hiervan is betoogd dat de verdachte en het slachtoffer in de eerste plaats in staat moeten worden gesteld bemiddelingsinformatie te delen met bepaalde categorieën buitengerechtelijke derden. Daarnaast is betoogd dat het bemiddelingsdeelnemers moet worden toegestaan informatie betreffende verdere strafbaar feiten, een bekentenis of

een opzettelijke niet-nakoming van de bemiddelingsovereenkomst openbaar te maken. Voor een optimale werking van de betoogde reikwijdte van het vertrouwelijkheidsprincipe is het van belang dat dit beginsel en de voorgestelde uitzonderingen wettelijk worden verankerd. Daarnaast dienen de bemiddelingsdeelnemers afdoende te worden geïnformeerd over het bereik van het vertrouwelijke karakter van strafrechtelijke bemiddeling voorafgaand aan hun deelname.

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